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No. _____

In The

Supreme Court of the United States

October Term, 1994

DELTA AIRLINES, INC.,

Petitioner,

versus

NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURH, PENNSYLVANIA,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

When a bankruptcy court in an adversary proceeding enjoins a party to that proceeding from depositing the amount of a state court judgment into the registry of the state court, and orders the party to deposit the money into the registry of the bankruptcy court, disburses it and dismisses the bankruptcy petition, does the bankruptcy court have subsequent jurisdiction and authority in the still extant adversary proceeding to protect by injunction the depositor against a state court suit for a portion of the money that had been deposited into the registry of the bankruptcy court?

PARTIES TO THE PROCEEDINGS

Delta Airlines, Inc.
Petitioner

National Union Fire Insurance Company of
Pittsburgh, Pa.
Respondent

Howard K. Schwamb, Jr.
Mary R. Schwamb
Former Petitioners in Bankruptcy

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NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURH, PENNSYLVANIA,

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Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

Delta Airlines, Inc. petitions for a writ of certiorari to review a judgment of the United States Court of Appeals for the Fifth Circuit, affirming a judgment of the United States District Court, Eastern District of Louisiana, reversing a judgment of the Bankruptcy Court, Eastern District of Louisiana.

OPINIONS BELOW

The Per Curiam of the United States Court of Appeals for the Fifth Circuit, affirming the district court's

reversal of the bankruptcy court, is not reported. (App. 1.) The judgment of the United States District Court, Eastern District of Louisiana, reversing the bankruptcy court's judgment is not reported. (App. 5.) The bankruptcy court's judgment is not reported. (App. 17.)

JURISDICTION

The United States Court of Appeals for the Fifth Circuit entered on February 10, 1995, its Per Curiam affirming the judgment of the United States District Court, Eastern District of Louisiana. Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case concerns the jurisdiction and authority of a bankruptcy court to protect and effectuate, after dismissal of the bankruptcy petition, an order the bankruptcy court had previously issued in a related Adversary Proceeding that continued to be litigated after the dismissal of the bankruptcy petition. The statutory authority for the bankruptcy court to follow up its order with an injunction protecting a party from untoward consequences of complying with that order are 11 U.S.C. § 105, 11 U.S.C. § 349, 28 U.S.C. § 1367, 28 U.S.C. § 1651, 28 U.S.C. § 2283.

The judgments of the district court and the Court of Appeals denying to the bankruptcy court its jurisdiction and authority to issue the injunction in the circumstances of this case deprives Delta of adequate due process of law

under Amendment V, United States Constitution, since Delta, through no fault of its own, and because of its compliance with a federal court order, is left without a remedy against state court litigation that would never have arisen had it not been for Delta's compliance with the bankruptcy court's order.

STATEMENT OF THE CASE

The Louisiana State Supreme Court on March 11, 1988, denied an application by Delta Airlines, Inc., for writs and thereby finalized a tort suit judgment rendered in November, 1985, in favor of Howard and Mary Schwamb against Delta Airlines in the 21st Judicial District Court, Parish of Tangipahoa, State of Louisiana. Following an immediate demand four days later by Schwambs' counsel Paul Dué for payment of the judgment, he and counsel for Delta agreed upon what was owed, including interest, and Delta's counsel delivered on March 22, 1988, to Schwambs' counsel three checks in satisfaction of the judgment.[1]

Schwambs' counsel on March 28, 1988, returned the three checks, and requested that one check be issued and deposited in the registry of the 21st Judicial District Court, **"in light of the worker's compensation issue . . . "** (Rec. 72, 260.)

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[1] There was a minor dispute concerning costs, which was later resolved by Delta's deposit into the registry of the bankruptcy court of an additional $5,287.40, and delivery to Schwamb's attorney on August 22, 1988, of another check in the amount of $2,151.08.

Within a week thereafter, the Schwambs had engaged new counsel, and had filed in the United States Bankruptcy Court, Eastern District of Louisiana,[2] Adversary Proceeding 88-0099K which, among other demands, requested that the amount Delta owed in satisfaction of the judgment be deposited in the registry of the bankruptcy court, and not in the state court. The bankruptcy court on April 5, 1988, three weeks after the state court judgment became final, issued a restraining order enjoining Delta and Schwambs' previous counsel from disposing of or depositing the judgment funds into the registry of the state court, and ordering that the funds, in the amount of $1,379,587.50, be deposited "in their entirety" into the registry of the bankruptcy court.

Delta on April 14, 1988, obeyed that order.

Four months later, on August 11, 1988, the bankruptcy court granted the Schwambs' Motion for Authority to Compromise Claims, Release Funds From the registry of the Court, And to Dismiss Bankruptcy, and disbursed to the Schwambs the entire amount of the judgment deposited by Delta into the registry of the bankruptcy court, less $617,463.85 disbursed to their former attorney Dué. Bankruptcy case No. 85-00355K, the voluntary petition for relief under Chapter 11 of the Bankruptcy Court Code, was dismissed.

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[2] The Schwambs had filed for bankruptcy under Chapter 11 in February, 1985, some months before their suit against Delta was tried in state court in October, 1985. They filed their adversary proceeding 88-0099K in their Bankruptcy Case 85-00355K.

Adversary Proceeding 88-0099K, in which Delta had been ordered to deposit the money into the bankruptcy court, *was not* dismissed.[3]

On February 2, 1989, the Schwambs filed in the record of the 21st Judicial District Court, a Satisfaction of Judgment, declaring that all obligations under the judgment against Delta had been fully satisfied and all obligations thereunder fully discharged.

Meanwhile, National Union Fire Insurance Company of Pittsburgh, Pennsylvania ("National Union") had paid to Howard Schwamb $98,000 in workmen's compensation and medical benefits because of the accident for which Delta was found liable. Schwamb was obligated to reimburse this money to National Union out of the total judgment awarded. (La. R.S. 23:1102, 1103. App. 30, 35. National Union argued that Delta's deposit of the money into the registry of the bankruptcy court constituted a "settlement" with the Schwambs, entitling National Union to notification by Delta of the deposit. The bankruptcy court correctly rejected this argument. App. 14-15.) National Union did not intervene in the Schwamb tort suit against Delta until the first day of trial, in October, 1985, at which time its intervention to recover whatever Schwamb owed it was severed from trial of the main demand.[4]

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[3] As late as October, 1990, Dué, Schwamb's former counsel and a defendant with Delta in Adversary Proceeding 88-0099, filed in that adversary litigation a Motion to Enforce Settlement, and a Request for Production of Documents.

[4] Since the state court judgment awarded Schwamb $200,000 for past loss of earnings, and $300,000 for future loss of earnings, there is no question but that National Union would be

National Union sat on this intervention, doing nothing to prosecute it, until October 16, 1989, four years after the state trial court judgment in favor of the Schwambs, a year and a half after the judgment became final, more than a year and a half after Delta had deposited the amount of the judgment into the registry of the bankruptcy court, 14 months after the Schwambs were discharged in bankruptcy, and eight months after plaintiffs had filed in the record of the 21st Judicial District Court the Satisfaction of Judgment. Then National Union awakened to the fact that Schwamb had not reimbursed to it the amount of benefits it had paid to him under the Workmen's Compensation Statute. Schwamb apparently refused to pay what he owed, so National Union decided to sue Delta, and filed in the 21st Judicial District Court an Amended Petition of Intervention, demanding that Delta pay National Union if Schwamb wouldn't do it. Delta challenged by motion in state court National Union's attempt to compel Delta to pay what was owed by Schwamb, and that court on July 2, 1990, referred the motion "to the merits".

To protect itself from an effort by National Union to make Delta pay what Schwamb owed to National Union, Delta on August 22, 1990, filed a third party complaint in the still extant Adversary Proceeding No. 88-0099-K, which had been initiated by the Schwambs in April, 1988,

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entitled to full reimbursement of its claim in precedence to Schwamb's right to those funds; that is, National Union's money would come "off the top" of the total judgment. *St. Paul Fire & Marine Ins. Co. v. Smith*, 609 So.2d 809 (La. 1992); *Brooks v. Chicola*, 514 So.2d 7 (La. 1987); *Harrison v. Otis Elevator Co.*, 935 F.2d 714 (5th Cir. 1991).

to compel Delta to deposit the full amount of the judgment into the bankruptcy court, and moved for summary judgment and injunctive relief . The bankruptcy court on August 28, 1990, issued a preliminary injunction, but on January 15, 1993, dismissed Delta's third party complaint **"without prejudice to be refiled, if warranted, as a declaratory judgment action."** (App. 22, 26, 28.) It further ordered that "the preliminary injunction issued August 28, 1990, enjoining any further state court action remain in effect until further notification by this Court." (App. 22, 26, 28.) Accordingly, Delta promptly filed a Complaint For Declaratory Judgment, Adversary Proceeding 93-1027THK, tracking the allegations of its previous third party complaint. Delta again moved for summary judgment, and National Union filed a cross motion for summary judgment.

The bankruptcy court took both motions under advisement and ordered an accounting of all funds received and disbursed by the Schwambs. (App. 20.) On October 29, 1993, the bankruptcy court denied National Union's motion and granted Delta's motion, with a permanent injunction relieving Delta from any further obligation to the Schwambs, National Union, or to anyone else for any amounts in excess of the $1,379,587.50 Delta deposited in the registry of the bankruptcy court pursuant to that court's order of April 5, 1988. (App. 13, 17.)

The bankruptcy court also decreed that Delta "owes no further obligations" to anyone for any amounts in excess of the money deposited into the registry of the bankruptcy court. (App. 18.)

National Union on November 15, 1993, filed in the United States District Court, Eastern District of Louisiana, its Notice of Appeal from the judgment of the bankruptcy court. The district court on June 24, 1994, reversed the bankruptcy court, stating that the bankruptcy court had no subject matter jurisdiction, and, even if it did, had no power to issue the permanent injunction. (App. 5.) The district court pointed to no error in any finding of fact by the bankruptcy court. It remanded the matter "for further orders that comport with this Order and Reasons." (App. 12.)

Delta appealed to the United States Court of Appeals for the Fifth Circuit, which in a Per Curiam February 10, 1995, affirmed the district court's reversal of the bankruptcy court, stating only that the "bankruptcy court lacked subject matter jurisdiction over the complaint . . . for the reasons related to subject matter jurisdiction set forth in the district court's Order and Reasons filed June 24, 1994". (App. 2.) In another Per Curiam on March 9, 1995, the Fifth Circuit denied Delta's Suggestion for Rehearing En Banc. (App. 3.)

REASONS FOR GRANTING THE PETITION

Through no fault of its own, Delta will be threatened by state court litigation if the bankruptcy court, which ex parte ordered Delta to divert the money judgment from the registry of the state court into the registry of the bankruptcy court, is denied jurisdiction and authority to protect Delta by injunction against a state court action arising because of the order.

The district and appellate courts' decisions denying the bankruptcy court's jurisdiction and authority to issue the injunction deprives the bankruptcy court of its ancillary power to enjoin in aid of its jurisdiction or to protect or effectuate its judgments, contrary to well established authority, and leaves Delta without remedy or redress from untoward consequences of its compliance with the bankruptcy court's order – in effect leaving Delta to face deprivation of property in state court because of denial of due process in federal court.

ARGUMENT AND AUTHORITIES[5]

The district court reasoned that since Schwamb's petition in bankruptcy had been dismissed in August, 1988, Delta's jeopardy in state court as a consequence of obeying the bankruptcy court's earlier order in the adversary proceeding could have no "conceivable effect" on the bankrupt's estate, and was therefore beyond the pale of the bankruptcy court's jurisdiction, citing *B., Inc. v. Miller Brewing Co.*, 663 F.2d 545 (5th Cir. 1981); *Matter of*

[5] Since the appellate and district courts relied solely on the district court's "reasons relating to subject matter jurisdiction" in denying Delta relief, Delta does not now discuss in this petition any of National Union's other arguments against the injunction, for example, those relating to the "relitigation exception" to the Injunction Act, 28 U.S.C. § 2283, and lack of "notice" of the bankruptcy court's deposit order, all of which arguments were previously briefed but apparently were not considered by either the appellate or district courts essential to, or dispositive of, the issue of the validity of the bankruptcy court's injunction decree.

Wood, 825 F.2d 90 (5th Cir. 1987); *Pacor, Inc. v. Higgins*, 743 F.2d 984 (3d Cir. 1984); *Matter of Majestic Energy Corp.*, 835 F.2d 87 (5th Cir. 1988); *In Re Alpha Steel Co.*, 142 B.R. 465 (M.D. Ala. 1992); *In Re Spaulding & Co.*, 131 B.R. 84 (N.D. Ill. 1990); *In Re Marine Iron & Shipbuilding Co.*, 104 B.R. 976 (D. Minn. 1989).

> "The Court holds that Delta's third-party claim [sic, Delta's Complaint for Declaratory Judgment had been substituted for the third-party claim] cannot have an effect on the bankruptcy case because the Schwambs' case was dismissed in 1988. Further, as the *Pacor* court observed, a third-party complaint, like Delta's here, could in no 'way impact upon the handling an administration of the bankruptcy estate' because the bankrupt estate no longer exists".
>
> – App. 10

Moreover, said the district court, even if the bankruptcy court had subject matter jurisdiction, it did not have power to issue a permanent injunction, because Delta's potential liability to National Union would not threaten the bankruptcy estate, which "no longer exists because the bankruptcy case was dismissed". (App. 11.)

It should first be noted that the order commanding Delta to deposit the money in the registry of the bankruptcy court was issued in Adversary Proceeding 88-0099K, an action which remained extant through January 15, 1993, when the bankruptcy court dismissed Delta's third party complaint "without prejudice to be refiled, if warranted, as a declaratory judgment action." (Supra.) An adversary proceeding in a bankruptcy court,

and its companion bankruptcy case, are two distinct proceedings, *In Re Morris*, 950 F.2d 1531 (11 Cir. 1992); so the dismissal of the underlying bankruptcy case here in August, 1988, affected not a bit the vitality of the adversary proceeding. 11 U.S.C. 349; *In Re Morris*, above; *In Re Carraher*, 971 F.2d 327 (9th Cir. 1992); *In Re Universal Farming Industries*, 873 F.2d 1334 (9th Cir. 1989); *In Re Smith*, 866 F.2d 576 (3rd Cir. 1989); *In Re Franklin*, 802 F.2d 324 (9th Cir. 1986); *In Re Porges*, 157 B.R. 212 (Bankr. E.D. N.Y. 1993); *In Re Lawson*, 156 B.R. 43 (Bankr. 9th Cir.); *In Re Fleet Service Corp.*, 144 B.R. 909 (Bankr. M.D. Florida 1992); *In Re Roma Group, Inc.*, 137 B.R. 148 (Bankr. S.D. N.Y. 1992); *In Re Stardust Inn, Inc.*, 70 B.R. 888 (Bankr. E.D. Pa. 1987); *In Re Case*, 27 B.R. 844 (Bankr. S.D. 1983); *In Re Pocklington*, 21 B.R. 199 (Bankr. S.D. C.A. 1982); *In Re Lake Tahoe Land Co., Inc.*, 12 B.R. 479 (D. Nev. 1981)

In *In Re Franklin*, supra, construing the jurisdiction of the bankruptcy courts under 28 U.S.C. § 157 and 28 U.S.C. § 1334(b), in light of the question of whether a bankruptcy court retains jurisdiction to construe its own orders when a declaratory judgment action is filed in the district court after the dismissal of the underlying bankruptcy proceeding, the Ninth Circuit said:

> "Simply put, bankruptcy courts must retain jurisdiction to construe their own orders if they are to be capable of monitoring whether those orders are ultimately executed in the intended manner. Requests for bankruptcy courts to construe their own orders must be considered to rise under title 11 if the policies underlying the Code are to be effectively implemented".
>
> – *In Re Franklin*, at 326.

Compare *In Re Taylor*, 884 F.2d 478 (9th Cir. 1989), in which jurisdiction was lost when *both* bankruptcy case and its companion adversary proceeding were dismissed; *In Re Moseley*, 161 B.R. 382 (Bankr. E.D. Tex. 1993), in which dismissal of the underlying bankruptcy case mooted the issues raised in two adversary proceedings, the dismissal of which would deprive no one of an adequate remedy at law; and *UN-Common Carrier Corp. v. Oglesby*, 98 B.R. 751 (S.D. Miss. 1989), in which no party would suffer prejudice by a dismissal of the adversary proceeding. In both of the two latter cases, the courts indicated that they would have continued to exercise jurisdiction, regardless of the dismissal of the underlying bankruptcy cases, had it been shown that dismissal "would leave party without adequate remedy at law", (*Moseley*, headnote 5), or "where dismissal would cause prejudice to one of the parties". (*UN-Common Carrier*, headnote 3.)

Certainly, Delta is threatened here with severe prejudice and left without an adequate remedy at law if the bankruptcy court, which caused Delta to divert the money from the registry of the state court into the registry of the bankruptcy court, is denied authority and jurisdiction to protect Delta by injunction against threatened loss as a consequence of Delta's obedience to the federal court order.

The dismissal of the bankruptcy petition itself is, therefore, irrelevant and immaterial to the continuing jurisdiction of the bankruptcy court in Adversary Proceeding 88-0099K. If the bankruptcy court exercised its rightful jurisdiction and power in Adversary Proceeding 88-0099K by restraining Delta from putting the money

into the registry of the state court (where it would have been routinely disbursed, with no complaint from anyone), and ordering it to deposit the money in the bankruptcy court, the bankruptcy court's jurisdiction and authority continued to be available to issue any orders and decrees necessary to protect Delta against untoward consequences arising, through no fault of Delta, because of its compliance with the bankruptcy court's order. This authority extended throughout the existence of Adversary Proceeding 88-0099K (which, insofar as Delta knows, is still extant) and cloaked Adversary Proceeding 93-1027 THK, the Complaint for Declaratory Judgment filed by Delta at the invitation of the bankruptcy court to replace Delta's third party complaint in Adversary Proceeding 88-0099K. A bankruptcy court has power to render declaratory relief. 28 U.S.C. § 2201; *In re Spencer*, 7 B.R. 458 (S.D. Cal. 1980). A bankruptcy court likewise has the authority to protect, aid and effectuate its judgment and decrees. This exception to the anti-injunction statute, 28 U.S.C. § 2283, applies to orders such as the one compelling Delta to deposit the amount of the state court judgment into the registry of the bankruptcy court. *Sperry Rand Corporation v. Rothlein*, 288 F.2d 245 (2d Cir. 1961); *Olin Corp. v. Insurance Co. of North America*, 807 F.Supp. 1143 (S.D.N.Y. 1992); *Complaint of Cosmopolitan Shipping Co. S.A.*, 453 F.Supp. 268 (1978); *Baker v. Gotz*, 415 F.Supp. 1243 (1976).

The district court's constriction of the bankruptcy court's jurisdiction ignores the continuity of the bankruptcy court's jurisdiction over Adversary Proceedings 88-0099K and 93-1027THK; disregards the bankruptcy court's ancillary jurisdiction, *Local Loan Co. v. Hunt*, 292

U.S. 234 (1933); *Griffith v. Realth Executives, Inc.*, 6 B.R. 753 (Bankr. D. N. M. 1980), and inhibits the bankruptcy court's inherent power to assert authority to protect or effectuate its orders, judgments and decrees. 28 U.S.C. 2283, *Local Loan Co.*, supra; *Dugas v. American Surety Co.*, 300 U.S. 414 (1936); *Julian v. Central Trust Co.*, 193 U.S. 93 (1903); *Pepper v. Litton*, 308 U.S. 295 (1939); *Royal Ins. Co. of America v. Quinn-L Capital Corp.*, 960 F.2d 1286 (5th Cir. 1992); *Southmark Properties v. Charles House Corp.*, 742 F.2d 862 (5th Cir. 1984); *Matter of Barnes*, 969 F.2d 526 (7th Cir. 1992).

Compare *Kokkonen v. Guardian Life Ins. Co. of America*, 114 S.Ct. 1673 (1994), in which the Court qualified the "expansive" language of *Julian*, supra, with a quotation from *Fulton Nat. Bank of Atlanta v. Hozier*, 267 U.S. 276, 280 (1924):

> " '[N]o controversy can be regarded as dependent or ancillary unless it has direct relation to property or assets actually or constructively drawn into the court's possession or control by the principal suit' ".
>
> – *Kokkonen*, at 1676.

Certainly, the "controversy", i.e., the adversary proceeding in which Delta was constrained to deposit the amount of the judgment into the registry of the bankruptcy court, had a direct relation to property or asserts drawn into the court's possession or control in connection with the bankruptcy petition. The exercise here by the bankruptcy court of its ancillary jurisdiction to protect Delta by injunction is "typically" appropriate where the matter "involves claims by a defending party hailed into court against his will, . . . whose rights might be irretrievably lost unless he could assert them

in an ongoing action in a federal court . . . " *Owen Equipment & Erection Co. v. Kroger*, 437 U.S. 365, 376 (1977).

Delta submits that in addition to the court's inherent ancillary jurisdiction, express supplemental jurisdiction to enjoin litigation against Delta in the circumstances of this case is conferred on the bankruptcy court by 28 U.S.C. § 1367. See *In Re W.J. Services, Inc.*, 139 B.R. 824 (Bankr. S.D. Texas, 1992); *In Re Joint E. & So. Dist. Asbestos Litigation*, 769 F.Supp. 85 (E.&S. D.N.Y. 1991). Compare *In Re Fisher*, 151 B.R. 895 (Bankr. N.D. Ill. 1993).

The abdication here by a federal court of its power to protect Delta from civil double jeopardy in state court as a consequence of Delta's innocent compliance with the federal court's order would threaten Delta with deprivation of property through a denial of due process, U.S. Const. Amend. V., since –

1 – Delta had a constitutionally protected interest in the property, i.e., the money it intended to deposit in satisfaction of the judgment into the registry of the state court, but which was ordered ex parte by the bankruptcy court to be deposited into the registry of the bankruptcy court.

2 – The bankruptcy court's order, depriving Delta of its right to deposit the money into the registry of the state court, has provoked litigation in state court that may compel Delta to pay double a portion of what it owed in satisfaction of the state court judgment.

3 – Unless the bankruptcy court has authority to protect Delta by injunction against suit in state court as a consequence of Delta's

> compliance with the bankruptcy court order, Delta will be deprived of property through a denial of due process. *Lehr v. Robertson*, 463 U.S. 248 (1982); *Greenholtz v. Nebraska Penal Inmates*, 442 U.S. 1 (1978); *Board of Regents v. Roth*, 408 U.S. 564 (1971); all cited in *Bank of Jackson County v. Cherry*, 980 F.2d 1362 (11 Cir. 1993).

" ' . . . due process' unlike some legal rules, is not a technical conception, with a fixed content, unrelated to time, place and circumstances." *Anti-Fascist Committee v. McGrath*, 341 U.S. 123, 163 (1950); *Mathews v. Eldridge*, 424 U.S. 319, 334 (1975); *Cafeteria Workers v. McElroy*, 367 U.S. 886, 895 (1960); "The very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation." *Cafeteria Workers v. McElroy*, supra, 895. ". . . due process is flexible and calls for such procedural protections as the particular situation demands." *Morrissey v. Brewer*, 408 U.S. 471, 481 (1971); *Mathews v. Eldridge*, supra, at 334.

If "Fifth Amendment due process considerations take precedence over the discharge provisions of the Bankruptcy Code" where lack of notice is involved, *In Re Eliscu*, 85 B.R. 480, 482 (Bankr. N.D. Ill. 1988), citing *Mullane v. Central Hanover Tr. Co.*, 339 U.S. 306 (1949), should not the same considerations be paramount when a party is threatened in state court with deprivation of property as a direct consequence of its compliance with a federal court order?

A bankruptcy court is a court of equity. *Pepper v. Litton*, supra.

> " . . . its equitable powers allow a bankruptcy court to produce fair and just results 'to the end that fraud will not prevail, that substance will not give way to form, that technical considerations will not prevent substantial justice from being done.' "
>
> – *In Re Octagon Roofing*, 157 B.R. 852, 856 (N.D. Ill. 1993), quoting *Pepper v. Litton*, supra, at 304-305.

Was fraud present here? When the Schwambs filed their Disclosure Statement in May, 1988, in anticipation of being dismissed in bankruptcy, the bankruptcy court in its order noticing a hearing on the Disclosure Statement instructed that " . . . a copy of this Order and Notice of Hearing on Debtors' Disclosure Statement should be transmitted by the debtors' counsel to all creditors and *parties in interest*". (Emphasis added.) Despite the fact that National Union was obviously a "party in interest", no service of the Disclosure Statement was made upon it; to the contrary, the Schwambs' new counsel and their former counsel Dué, a defendant with Delta in the adversary proceeding, discussed how National Union might be kept in the dark about the judgment money available to pay the Schwambs' debt to National Union. In a letter dated June 10, 1988, Dué's attorney advises the Schwambs' new counsel that Dué –

> " . . . is freeing up over $100,000 to the Schwambs immediately, *which sum they may be able to keep forever if the compensation insurer does not enter into the fray*, since they did not protect

themselves in the state court proceeding . . . " [Emphasis added.]

– Rec. 140.

On July 7, 1988, the Schwambs filed their Motion for Authority to Compromise Claims, and be dismissed from bankruptcy, arguing that all obligations to all "parties in interest" had been satisfied, and that "There is no longer any reason for the Debtors to remain under the protection of the bankruptcy court." Accompanying this motion was a letter directed to the bankruptcy court, declaring that "This motion will be served on all creditors and all parties at interest as soon as a hearing date is set . . . " In the Notice prepared by the Schwambs for the bankruptcy court's signature, alerting all others to the pending Motion for Authority to Compromise Claims, there is the admonition that "Any creditor or *party at interest* having an objection to the motion should file same on or before August 8, 1988 . . . " (Emphasis added.)

Apparently National Union did not get notice of the hearing, despite the bankruptcy court's order that "a notice *MUST* be prepared for service to each *party in interest*". (Emphasis added.) Accordingly, Schwambs' voluntary petition for bankruptcy was dismissed on August 11, 1988, with no one – and especially the bankruptcy Court – the wiser about the disposition of the $100,000 Schwamb owed National Union.

Those were the circumstances the bankruptcy court had in mind when it sought to protect Delta and commented:

> "The Court feels that an injustice has been done and that if notice had been sent to all interested parties, we would not be here today."
>
> – App. 19.

Complicity aside, and regardless of the narrow "conceivable effect" on the estate of the bankrupt after the bankruptcy petition was dismissed in August, 1988, the bankruptcy court had full "subject matter" jurisdiction when in the *adversary proceeding* it entered its order of April 5, 1988, commanding Delta to deposit the entire amount of the money into the registry of the bankruptcy court, and restraining Delta from putting the money into the registry of the state court. From that unquestionably proper exercise of its jurisdiction flowed the later right of the bankruptcy court to protect and effectuate that decree so "that substance will not give way to form, that technical considerations will not prevent substantial justice from being done." *Pepper v. Litton*, supra.

> "The Federal court, in protecting the purchaser [read "Delta"] under such circumstances, was acting in pursuance of the jurisdiction acquired when the foreclosure [read "adversary"] proceedings were begun.
>
> "In Farmers' Loan & Trust Co., (original,) 129 U.S. 206, 213, Mr. Justice Miller said: 'But the doctrine that, after a decree which disposes of a principal subject of litigation and settles the right of the parties in regard to that matter, there may subsequently arise important matters requiring the judicial action of the court in relation to the same property and some of the same rights litigated in the main suit, making necessary substantive and important orders and

> decrees in which the most material rights of the parties may be passed upon by the court, and which, when they partake of the nature of final decisions of those rights may be appealed from, is well established by the decisions of this court.' "

– *Julian v. Central Trust Co.*, supra, at 112-113.

The seminal authority for the issuance here for the injunction by the bankruptcy court is *Local Loan Co. v. Hunt*, supra, in which Hunt borrowed $300.00 from Local Loan, gave as security an assignment of any wages thereafter earned, then filed for bankruptcy, listing among his liabilities the $300.00 he had borrowed from Local Loan. Hunt was adjudicated a bankrupt, and discharged from all debts and claims. Thereafter, Local Loan sued Hunt's employer in state court, to enforce the assignment on his wages Hunt had given as security for the loan. Hunt went back into the bankruptcy court, asking that Local Loan be enjoined from prosecuting its action in state court, and the bankruptcy court entered the injunction decree. Local Loan appealed, contending that the bankruptcy court had no jurisdiction to enjoin the prosecution of the action in state court. This Court disagreed:

> "First. The pleading by which respondent invoked the jurisdiction of the bankruptcy court in the present case is in substance and effect a supplemental and ancillary bill in equity, in aid of and to effectuate the adjudication and order made by the same court. That a federal court of equity has jurisdiction of a bill ancillary to an original case or proceeding in the same court, whether at law or in equity, to secure or preserve the fruits and advantages of a judgment or decree rendered therein, is well settled. [Citing]

> And this, irrespective of whether the court would have jurisdiction if the proceeding were an original one. The proceeding being ancillary and dependent, the jurisdiction of the court follows that of the original cause, and may be maintained without regard to the citizenship of the parties or the amount involved, and notwithstanding the provisions of § 265 of the Judicial Code (R.S., § 720), U.S.C., Title 28, § 379. [Citing *Julian v. Central Trust Co.*, above, and others.]
>
> "These principles apply to proceedings in bankruptcy. [Citing.]"
>
> – *Local Loan Co.*, supra, at 239-241.

Was not the complaint for declaratory judgment filed in Adversary Proceeding 93-1027 THK a "supplemental and ancillary bill in equity" justifiably invoking the rightful jurisdiction of the bankruptcy court if for no other reason than because of the "unusual circumstances" of the case?

Does not the failure of the bankrupt's counsel to notify the creditor, National Union, of the pending resolution of the bankruptcy, and the apparent complicity of the Schwambs' counsel in concealing from National Union the imminent distribution of the assets of the bankrupts, constitute "unusual circumstances" justifying the exercise by the bankruptcy court of its inherent power "to protect or effectuate its judgments"? 28 U.S.C. § 2283.

In *Dugas v. American Surety Co.*, above, American Surety Co., faced with claims in state court, filed an interpleader in the federal court in New Orleans and deposited into the registry of that court the total amount

of its liability under a certain insurance policy. The federal court enjoined all claimants from instituting or prosecuting in state court any claim against the amount deposited in the registry of the federal court, and eventually distributed to the various claimants their pro rata shares of the amount deposited in the registry of the court. One of the claimants continued to pursue a claim in state court relating to the money that had been deposited into the registry of the federal court. American Surety filed in federal court a "supplemental bill", seeking to enjoin the claimant from prosecuting his suit in state court. The claimant in state court challenged the federal court's jurisdiction over the supplemental action, since the original interpleader had gone to final judgment and was over, and challenged the federal court's power to enjoin the proceedings in state court.

This Court held that the federal court (1) had jurisdiction over the supplemental action, and (2) had authority to enjoin the state court proceeding:

> "5. The jurisdiction to entertain the supplemental bill is free from doubt. Such a bill may be brought in a federal court in aid of and to effectuate its prior decree to the end either that the decree may be carried fully into execution or that it may be given fuller effect, but subject to the qualification that the relief be not of a different kind or on a different principle. Such a bill is ancillary and dependent, and therefore the jurisdiction follows that of the original suit, regardless of the citizenship of the parties to the bill or the amount in controversy.
>
> "6. The power of the court to enjoin Dugas from further prosecuting his suit in the state

> court on the appeal bond has full support in §§ 2 and 3 of the Interpleader Act of 1926 before quoted, **as also in settled adjudications respecting the power of a federal court to protect its jurisdiction and decrees.**" [Emphasis added.]
>
> – *Dugas v. American Surety Co.*, at 428-429.

See also *Royal Ins. Co. of America v. Quinn-L Capital Corp*; *Southmark Properties v. Charles House Corp.*, and *Matter of Barnes*, above, for examples of the exercise by federal courts of ancillary and supplemental jurisdiction to protect and effectuate previous judgments and decrees. See also *In Re Unioil*, 948 F.2d 678 (10th Cir. 1991); *M. Prusman, Ltd. v. Ariel Maritime Group, Inc.*, 781 F.Supp. 248 (S.D.N.Y. 1991); and *State of Mich. v. City of Allen Park*, 739 F.Supp. 1102 (E.D. Mich. 1990). Although these cases do not concern, as do previous cases cited, an exercise of jurisdiction in a proceeding subsequent to one that has been terminated, they are confirmation of every court's broad authority to issue orders and judgments in aid of, and to effectuate, its previous orders and decrees. (" . . . the bankruptcy court's decision to set aside the assignments was a valid exercise of the bankruptcy court's equitable power to enforce its own orders." – *In Re Unioil*; "District court has inherent power to safeguard and protect integrity of its judgments." – *M. Prusman*; "District court has at its disposal broad range of equitable powers to enforce its orders and judgments, encompassing situations in which previous orders have been thwarted." – *State of Mich.*)

Delta submits that where its jurisdiction is established, as it was here in Adversary Proceeding 88-0099K, and consequently in Adversary Proceeding 93-1027THK,

the bankruptcy court was no more limited than any other federal court would be in its power to issue orders to effectuate its previous judgments and decrees. 28 U.S.C. §§ 1651, 2283.

> **§ 105. Power of court**
>
> (a) The court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title. No provision of this title providing for the raising of an issue by a party in interest shall be construed to preclude the court from, sua sponte, taking any action or making any determination necessary or appropriate to enforce or implement court orders or rules or to prevent an abuse of process.
>
> * * *
>
> – 11 U.S.C. § 105.

True, § 105 of the Bankruptcy Code does not "constitute a roving commission [for the bankruptcy court] to do equity . . . " *United States v. Sutton*, 786 F.2d 1305, 1308 (5th Cir. 1986); nevertheless, " . . . it authorizes bankruptcy courts to issue injunctions and take other necessary steps in aid of their jurisdiction." Id. 1307. To that end, the bankruptcy court here, in the same adversary proceeding in which it had restrained Delta from putting the money into the registry of the state court, and ordered Delta to deposit the money in the bankruptcy court, properly exercised its power when it enjoined others from prosecuting in state court any action which would threaten Delta with civil jeopardy for having complied with the order of the bankruptcy court. As this Court said in *French, Trustee v. Hay*, (22 Wall. 231) 89 U.S. 250 (1874),

affirming a federal court injunction against a state proceeding (concededly on circumstances different from those at bar):

> "If it (read, a remedy for Delta) could not be given in this case the result would have shown the existence of a great defect in our Federal jurisprudence, and have been a reproach upon the administration of justice."
>
> – *French, Trustee*, supra, p. 253.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

FRANCIS G. WELLER
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April, 1995

APPENDIX

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IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 94-30427

IN THE MATTER OF:
HOWARD K. SCHWAMB, JR.,
and MARY R. SCHWAMB,

Debtors.

NATIONAL UNION FIRE
INSURANCE COMPANY OF
PITTSBURGH, PENNSYLVANIA

Appellee,

versus

DELTA AIRLINES, INC.,

Appellant.

Appeal from the United States District Court
for the Eastern District of Louisiana
(93-CV-4120-F)
(Filed Feb. 10, 1995)

Before KING, EMILIO M. GARZA and DeMOSS, Circuit Judges,

PER CURIAM:*

The decision of the district court to reverse the decision of the bankruptcy court on the basis that the bankruptcy court lacked subject matter jurisdiction over the complaint is affirmed for the reasons relating to subject matter jurisdiction set forth in the district court's Order and Reasons filed June 24, 1994.

AFFIRMED.

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* Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public, and burdens on the legal profession." Pursuant to that Rule, the court has determined that this opinion should not be published.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 94-30427

In the Matter of: HOWARD K. SCHWAMB, JR.,
and MARY R. SCHWAMB,
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NATIONAL UNION FIRE INSURANCE COMPANY
OF PITTSBURGH, PENNSYLVANIA,

Appellee,

versus

DELTA AIRLINES, INC.,

Appellant.

Appeal from the United States District Court
for the Eastern District of Louisiana

ON SUGGESTION FOR REHEARING EN BANC

(Opinion 02/10/95), 5 Cir., ( ), ( )
F.3d ( ) (MAR. 9, 1995)

Before KING, EMILIO M. GARZA and DEMOSS, Circuit Judges.
PER CURIAM:

(X) Treating the Suggestion for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. No member of the panel nor Judge in regular active service of the Court having requested that the Court be polled on rehearing en banc (FRAP and Local Rule 35), the Suggestion for Rehearing En Banc is DENIED.

( ) Treating the Suggestion for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. The Court having been polled at the request of one of the members of the Court and a majority of the Judges who are in regular active service not having voted in favor (FRAP and Local Rule 35), the Suggestion for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/S/ Harold R. DeMoss
United States Circuit Judge

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

IN THE MATTER OF	*	CIVIL ACTION
HOWARD K. SCHWAMB, JR.	*	NO. 93-4120
and MARY R. SCHWAMB	*	SECTION "F"
	*	

ORDER AND REASONS

(Filed Jun. 24, 1994)

This appeal of the bankruptcy court's decision is brought by National Union Fire Insurance Co. For the following reasons, the decision is REVERSED.

I. Background

On January 14, 1984 the debtors, Howard K. Schwamb and Mary P. [sic] Schwamb, filed suit in state court against Delta Airlines for personal injuries sustained aboard Delta flight 1662 from Chicago to New Orleans. On February 21, 1985 the Schwambs filed their petition for relief under Chapter 7 of the Bankruptcy Code. The trial in state court against Delta commenced on October 21, 1985.National Union intervened in the state court suit to recover worker's compensation payment it made to the Schwambs. The state court severed National Union's claim from the other claims and scheduled National Union's claim to be tried at a later date. On November 8, 1985 the Schwambs got a judgment against Delta for $1,015,000 plus costs. The judgment became final on March 11, 1988, when the Louisiana Supreme Court denied Delta's application for writs.

In a letter dated March 22, 1988 Delta delivered to the Schwambs' counsel three checks in satisfaction of the judgment with a reservation concerning the amount of costs due. By letter of March 28, 1988 the Schwambs' counsel returned to Delta's counsel the three checks "with the request that in light of the worker's compensation issue, you instead immediately have all of this money placed in the form of one check deposited in the Registry of the 21st Judicial District Court . . . "

On April 4, 1988, the Schwambs, through new counsel, filed in the bankruptcy court a complaint to compel Delta to deposit the amount of the judgment plus interests in the bankruptcy court. The bankruptcy court ordered Delta to file the money into the registry of the court. Delta complied. The funds were used to pay creditors, with the remainder apparently disbursed to the Schwambs and their counsel. The bankruptcy proceeding was then dismissed.

On February 2, 1989 Schwamb's counsel filed in the record a satisfaction of judgment. On October 16, 1989 National Union filed an amended Petition of Intervention in state court claiming that Delta owed National Union $98,086 in workmen's compensation benefits that Schwamb had collected from National Union as a result of the accident for which Delta was found liable. Delta objected and moved for summary judgment, which was denied by the state court.

Then, on August 22, 1990, Delta filed a third-party complaint against National Union in an adversary proceeding in the bankruptcy court. Delta's complaint included a request for injunctive relief. The bankruptcy

court issued a preliminary injunction on August 28, 1990 enjoining any further state court action by the parties. On January 15, 1993 the bankruptcy court dismissed Delta's third-party complaint without prejudice to be refiled, if warranted, as a declaratory judgment action. The Bankruptcy court also ordered that the preliminary injunction remain in effect.

Delta then commenced the adversary proceeding from which this appeal is taken, requesting a permanent injunction to bar any party from bringing claims against Delta in any court. Delta also moved for summary judgment, which was opposed by the Schwambs and National Union. National Union filed a cross-motion for summary judgment to recover the costs associated with Delta's failure to notify National Union or the bankruptcy court of the full scope of the proceedings involving the funds used to satisfy the state court judgment.

II. The Ruling Below

On October 29, 1993 the bankruptcy court denied National Union's motion, granted Delta's motion for summary judgment, and granted the permanent injunctive relief sought by Delta. This Court reverses.

III. Standard of Review

The district court will only set aside the findings of fact made by a bankruptcy court for clear error. Bankr. R. 8013; *In re Missionary Baptist Found.*, 818 F.2d 1135, 1142 (5th Cir. 1987). A finding of fact is clearly erroneous when

the reviewing court is left with a definite and firm conviction that a mistake has been made. *United States v. United States Gypsum Co.*, 333 U.S. 364, 395 (1948). Additionally, when reviewing matters that are within the discretion of the bankruptcy court, a district court applies an abuse of discretion standard of review. *In re Texas Extrusion Corp.*, 844 F.2d 1142, 1158 (5th Cir. 1988), *cert. denied, Texas Extrusion Corp. v. Lockheed Corp.*, 488 U.S. 926 (1988). The bankruptcy court's conclusions of law are subject to de novo review. *In re Perez*, 954 F.2d 1026, 1027 (5th Cir. 1992).

IV. Jurisdiction of the Bankruptcy Court

In *In re Wood*, 825 F.2d 90 (5th Cir. 1987), the Fifth Circuit established a two-step inquiry for determining whether a bankruptcy court has subject matter jurisdiction: "first, whether bankruptcy jurisdiction exists; [and] second, if jurisdiction does exist, whether the bankruptcy court may proceed over this matter as a 'core' or a 'non-core' proceeding."[1] *Id.* at 91. This test reflects the difference between the bankruptcy jurisdiction of a district court and the judicial power of a bankruptcy court. *Eubanks v. Esenjay Petroleum Corp.*, 152 B.R. 459, 461 (E.D. La. 1993)

The statutory grant to district courts is found in 28 U.S.C. § 1334, which provides that the court shall have

---

[1] Core proceedings are those over which the bankruptcy court may exercise full judicial power and non-core proceedings are those over which the bankruptcy court exercises only limited power. *Wood*, 825 F.2d at 91.

"original but not exclusive jurisdiction of all civil proceedings arising under title 11, or arising in or related to cases under title 11." 28 U.S.C. § 1334(b) (1993). Consequently, a bankruptcy court may exercise jurisdiction over a matter if it (1) arises under title 11; (2) arises in cases brought under title 11; or (3) is related to a title 11 matter.

Judge Wisdom, in *Wood*, explains that it is not necessary to distinguish between these three types of proceedings because these references operate conjunctively to define the scope of federal bankruptcy jurisdiction. *Id.* at 93. It is necessary only to determine whether a matter is related to the bankruptcy. *Id.*

The Fifth Circuit in *Wood* then adopted the Third Circuit's test for determining whether a proceeding is related to the bankruptcy case: "whether the outcome of that proceeding could conceivably have any effect on the estate being administered in bankruptcy." *Id.* (quoting *Pacor, Inc. v. Higgins*, 743 F.2d 984, 994 (3d Cir. 1984)). The *Pacor* court significantly elaborated on this inquiry by stating that an "action is related to bankruptcy if the outcome could alter the debtor's rights, liabilities, options, or freedom of action (either positively or negatively) and which in any way impacts upon the handling and administration of the bankrupt estate." *Pacor*, 743 F.2d at 994. The Fifth Circuit, more recently endorsed this equation in *In re Majestic Energy Corp.*, 835 F.2d 87, 90 (5th Cir. 1988).

The vast majority of the cases applying the conceivable effects test in connection with third-party complaints have found jurisdiction to be lacking. *In re Alpha Steel Co.*,

142 B.R. 465, 470-2 (M.D. Ala. 1992); *In re Spaulding & Co.*, 131 B.R. 84, 88-90 (N.D. Ill. 1990); *In re Marine Iron & Shipbuilding Co.*, 104 B.R. 976, 984-87 (D. Minn. 1989).

The question here, therefore, is whether Delta's third-party complaint against National Union, including the demand for injunctive relief, could have a conceivable effect on the Schwambs' bankruptcy case. The Court holds that Delta's third-party claim cannot have an effect on the bankruptcy case because the Schwambs' case was dismissed in 1988. Further, as the *Pacor* court observed, a third-party complaint, like Delta's here, could in no "way impact upon the handling and administration of the bankrupt estate" because the bankrupt estate no longer exists. *Pacor*, 743 F.2d at 994.

Therefore, because Delta's complaint fails the "conceivable effects" test, the bankruptcy court did not have subject matter jurisdiction over the complaint. Following the Fifth Circuit's *Wood* analysis, the question of whether the proceeding is core or non-core is irrelevant and need not be addressed. Furthermore, if a federal court rules in a matter over which it does not have jurisdiction, its decisions, opinions and orders are without effect. *B., Inc. v. Miller Brewing Co.*, 663 F.2d 545, 548 (5th Cir. 1981).

V. The Power of the Bankruptcy Court to Issue the Injunction

Even if it is determined that the bankruptcy court did have subject matter jurisdiction, the bankruptcy court did not have the power to issue a permanent injunction. Section 105 of title 11 specifically allows the bankruptcy court to issue a stay of a proceeding in a state court. H.R.

Rep. No. 595, 95th Cong., 1st Sess. 316 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5963. However, the bankruptcy court improperly relied on 11 U.S.C. §105 to permanently enjoin everyone from pursuing Delta in connection with this matter. Section 105 authorizes bankruptcy courts to "issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title." It does not authorize the type of permanent injunction ordered by the bankruptcy court in this case. Although injunctive relief is appropriate under Section 105 in certain circumstances, Section 105 "is not limitless and should not be employed as a panacea for all ills confronted in the bankruptcy cases." 2 *Collier on Bankruptcy* §105.01(3) (15th ed. 1993).

Because bankruptcy courts have only limited authority to enjoin third parties and to issue an injunction, a court must find that the failure to enjoin would impact the bankruptcy estate and would adversely or detrimentally influence and pressure the debtor through that third party. *In re Otero Mills, Inc.*, 25 B.R. 1018, 1021-2 (D.N.M. 1982). The factors to be considered in deciding whether the injunction should be issued include: (1) irreparable harm to the bankrupt estate if the injunction is not issued; (2) a strong likelihood of successful reorganization; (3) minimal or no harm to other parties; and (4) the public's interest in promoting successful reorganization. *Id.*

Delta's potential liability on this claim will not threaten the bankruptcy estate of the former debtors. The bankruptcy estate no longer exists because the bankruptcy case was dismissed. Even if the bankrupt estate could be affected, National Union's claim could not "detrimentally influence" or "pressure" the debtor.

The bankruptcy court's decision is REVERSED and this matter is REMANDED for further order that comport with this Order and Reasons.

New Orleans, Louisiana, June 23, 1994.

/s/ Martin L. C. Feldman
MARTIN L. C. FELDMAN
UNITED STATES
DISTRICT JUDGE

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF LOUISIANA

IN THE MATTER OF	NUMBER
HOWARD K. SCHWAMB, JR. and MARY R. SCHWAMB	**ADVERSARY NO. 93-1027-THK**
DEBTORS	
DELTA AIRLINES, INC.	
PLAINTIFF	
VERSUS	
HOWARD K. SCHWAMB, JR., MARY R. SCHWAMB, PAUL H. DUE, NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PENNSYLVANIA	Bankruptcy No. 85-10355-THK CHAPTER 7

MEMORANDUM OPINION

This matter came before the Court on August 17, 1993 as a hearing on the motion of Delta Airlines, Inc., for summary judgment and permanent injunction. National Union Fire Insurance Company of Pittsburgh, Pennsylvania ("National Union") has filed a cross-motion for summary judgment which is also pending before this Court. After considering the arguments of counsel at the hearing, the record in this matter, the memoranda submitted by the parties, and the applicable law, this Court enters the following Memorandum Opinion.

The facts of this case were recited in this Court's Reasons for Order of January 15, 1993 and for purposes of this opinion, this Court adopts the same. In its motion for summary judgment and for permanent injunctive relief,

Delta maintains that it owes no further obligation to the Schwambs, National Union, Paul H. Due or any other party for any amounts in excess of the $1,379,587.57 which it deposited into the registry of the Bankruptcy Court pursuant to this Court's order of April 5, 1988, relating to the judgment of the 21st Judicial District Court in Suit No. 70699 on the docket of that court. Moreover, Delta contends that an injunction should be issued prohibiting any party from prosecuting in any court, state or federal, any attempt to compel Delta to pay anyone any amount of money, or any other consideration, in addition to the amount already deposited into the Court's registry.

National Union's [sic] maintains in its cross-motion for summary judgment that despite National Union's intervention in the state court suit, Delta paid the proceeds of the judgment in the state court suit into the registry of this Court, without informing this Court of National Union's intervention, and without informing National Union of the proceedings in this Court. National Union contends that Delta should not profit from breaching its duties to this Court and to National Union, and requests this Court to enter a declaratory judgment holding Delta liable for the full amount of National Union's intervention in the state court suit.

After carefully considering this matter, this Court finds that Delta had no obligation to notify National Union of the proceedings in this Court. The cases cited by National Union concerning this issue, *Shiver v. Wilson's Department Store*, 559 So.2d 864 (La.App. 4th Cir. 1990), *St. Paul Fire & Marine Ins. Co. v. Whitmore*, 578 So.2d 1180, 1183 (La.App. 5th Cir. 1991), and *Aetna Casualty & Surety Co. v. Hanover Ins. Co.*, 569 So.2d 1078, 1081 (La.App. 3d

Cir. 1990) *aff'd* 574 So.2d 363 (La. 1991), are inapposite to the case at bar. These cases stand for the proposition that the "settling tortfeasor" may be liable to a worker's compensation intervenor if the settlement is made without notice to the intervenor. As Delta has pointed out, Delta did not settle or compromise any claim. Pursuant to this Court's order, Delta satisfied a judgment by paying the amount of money due into the registry of this Court. Accordingly, this Court finds that Delta owes no further obligations to the Schwambs, National Union, Paul Due, or any other party for any amounts in excess of the $1,379,587.57 which it deposited into the registry of the Bankruptcy Court. Furthermore, pursuant to this Court's equitable powers found in 11 U.S.C. §105, this Court permanently enjoins any party from prosecuting in any court, state or federal, any attempt to compel Delta to pay anyone any amount of money, or any other consideration, in addition to the amount already deposited into the Court's registry in connection with this matter.

Finally, this Court finds that National Union's charge that Delta violated Local Rule 1.05 is without merit. As Delta points out, this rule is directed to a party who files a lawsuit ("counsel shall append on a separate sheet of paper, to the front of the complaint . . . "). Delta was brought into the original adversary proceeding in this matter, Adv. No. 88-0099-K, commenced on April 4, 1988, as a defendant. The only participation of Delta in the proceeding was to comply with the Court's order that Delta deposit the amount of the state court judgment into the registry of the Court. Therefore, this Court rejects this argument of National Union.

Accordingly, Delta's motion for summary judgment is **Granted.** National Union's cross-motion for summary judgment is **Denied.** An appropriate Judgment will be entered.

New Orleans, Louisiana, this 29th day of October, 1993.

/s/ T. H. Kingsmill, Jr.
T. H. KINGSMILL, JR.
U. S. BANKRUPTCY JUDGE

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF LOUISIANA

IN THE MATTER OF	NUMBER
HOWARD K. SCHWAMB, JR. and MARY R. SCHWAMB	**ADVERSARY NO. 93-1027-THK**
DEBTORS	
DELTA AIRLINES, INC.	
PLAINTIFF	
VERSUS	
HOWARD K. SCHWAMB, JR., MARY R. SCHWAMB, PAUL H. DUE, NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PENNSYLVANIA	Bankruptcy No. 85-10355-THK CHAPTER 7

JUDGMENT

This matter came before the Court on August 17, 1993 as a hearing on the motion of Delta Airlines, Inc., for summary judgment an [sic] permanent injunction. National Union Fire Insurance Company of Pittsburgh, Pennsylvania has filed a cross-motion for summary judgment which is also pending before this Court. After considering the arguments of counsel at the hearing, the record in this matter, the memoranda submitted by the parties, the applicable law, and in accordance with the foregoing Memorandum Opinion.

IT IS ORDERED, ADJUDGED, AND DECREED that the motion for summary judgment of Delta Airlines, Inc. be and it hereby is **Granted;**

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the cross-motion for summary judgment of National Union Fire Insurance Company of Pittsburgh, Pennsylvania be and it hereby is **Denied;**

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Complaint for Declaratory Judgment as to Rights and Liabilities of Delta Airlines, Inc., with request for injunctive relief, be and it hereby is **Granted;**

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that Delta Airlines, Inc. owes no further obligations to the Schwambs, National Union, Paul Due, or any other party for any amounts in excess of the $1,379,587.57 which Delta Airlines, Inc. deposited into the registry of this Court;

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that pursuant to this Court's equitable powers found in 11 U.S.C. §105, this Court permanently enjoins any party from prosecuting in any court, state or federal, any attempt to compel Delta to pay anyone any amount of money, or any other consideration, in addition to the amount already deposited into this Court's registry in connection with this matter.

New Orleans, Louisiana, this 29th day of October, 1993.

/s/ T. H. Kingsmill, Jr.
T. H. KINGSMILL, JR.
U. S. BANKRUPTCY JUDGE

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF LOUISIANA

RECEIVED AUG 19 1993

MINUTE ENTRY
KINGSMILL, J.
AUGUST 17, 1993

IN THE MATTER OF	NUMBER
HOWARD K. SCHWAMB, JR. **MARY R. SCHWAMB**	
DEBTORS	**ADVERSARY NO.** **93-1027-THK**
DELTA AIRLINES, INC.	
PLAINTIFF	
VERSUS	
HOWARD K. SCHWAMB, JR., MARY R. SCHWAMB, PAUL H. DUE, NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PENNSYLVANIA	Bankruptcy No. 85-10355-THK
DEFENDANTS	CHAPTER 7

This matter came before Bankruptcy Judge T. H. Kingsmill, Jr. this date for hearing on the motion of Delta Airlines, Inc., Plaintiff, for summary judgment and permanent injunction (**P-8**).

PRESENT: FRANCIS G. WELLER,
Counsel for Plaintiff

EUGENE GERDES,
Counsel for Debtor/Defendants
Howard & Mary Schwamb

RICK CABALLERO,
Counsel for Defendant Paul Due'

STEPHEN PERKINS,
Counsel for Defendant National
Union Fire Insurance

The Court heard the statements of counsel concerning the motion. Upon questioning by the Court, no party felt aggrieved by the filing of Delta's reply memorandum filed this date.

The Court feels that an injustice has been done and that if notice had been sent to all interested parties, we would not be here today. **The motion of Delta Airlines, Inc., Plaintiff, for summary judgment and permanent injunction is taken under advisement.**

IT IS ORDERED that Howard and Mary Schwamb submit a complete accounting **no later than FRIDAY, AUGUST 27, 1993** of all funds received by counsel for the Schwambs and by the Schwambs, from whom received and to whom and when said funds were disbursed.

New Orleans, Louisiana, August 17, 1993.

/s/ T. H. Kingsmill, Jr.
T. H. KINGSMILL, JR.
BANKRUPTCY JUDGE

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF LOUISIANA

IN THE MATTER OF	NUMBER
HOWARD K. SCHWAMB, JR. AND MARY R. SCHWAMB	**ADVERSARY NO. 88-0099-K**
DEBTORS	
HOWARD K. SCHWAMB, JR. AND MARY R. SCHWAMB	Bankruptcy No. 85-00355-K
PLAINTIFFS	
VERSUS	
PAUL H. DUE, DEUTSCH, KERRIGAN & STILES, AND DELTA AIRLINES, INC.	CHAPTER 11

SUPPLEMENTAL AND AMENDED ORDER

On January 15, 1993, this Court issued an Order in the above captioned matter dismissing Delta Airlines, Inc.'s third party complaint without prejudice to be refiled, if warranted, as a declaratory judgment action. The Court's Order is supplemented and amended to read as follows:

This matter came before the Court as a hearing on the motion of Delta Airlines, Inc. ("Delta") for injunctive relief and for summary judgment. National Union Fire Insurance Company ("National Union"), third-party defendant in this proceeding, opposes the motion. After considering the argument of counsel at hearing, the record in the matter, the memoranda filed, the applicable law, and in accordance with the foregoing Reasons for Order,

IT IS ORDERED that Delta's motion for summary judgment be and it hereby is **Denied;**

IT IS FURTHER ORDERED that the third party complaint of Delta be and it hereby is **Dismissed without prejudice to be refiled, if warranted, as a declaratory judgment action.**

IT IS FURTHER ORDERED that the preliminary injunction issued August 28, 1990 enjoining any further state court action remain in effect until further notification by this Court.

New Orleans, Louisiana, this 21st day of January, 1993.

/s/ T. H. Kingsmill, Jr.
T. H. KINGSMILL, JR.
U. S. BANKRUPTCY JUDGE

TRUE COPY

JAN 21 1993
/s/ N.L. Cratty
FRANK J. MATHTOS, Clerk
UNITED STATES
BANKRUPTCY COURT
NEW ORLEANS, LA.

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF LOUISIANA

IN THE MATTER OF	NUMBER
HOWARD K. SCHWAMB, JR., AND MARY R. SCHWAMB	**ADVERSARY NO. 88-0099-K**
DEBTORS	
HOWARD K. SCHWAMB, JR. AND MARY R. SCHWAMB	Bankruptcy No. 85-00355-K
PLAINTIFFS	
VERSUS	
PAUL H. DUE, DEUTSCH, KERRIGAN & STILES, AND DELTA AIRLINES, INC.	CHAPTER 11

REASONS FOR ORDER

This matter came before the Court as a hearing on the motion of Delta Airlines, Inc. ("Delta") for injunctive relief and for summary judgment. National Union Fire Insurance Company ("National Union"), third-party defendant in this proceeding, opposes the motion. After considering the argument of counsel at hearing, the record in this matter, the memoranda filed, and the applicable law, this Court enters the following Reasons for Order.

On January 14, 1984, the Debtor in this matter, Howard K. Schwamb ("Schwamb") filed a petition in state court against Delta and various other codefendants. On February 21, 1985, the Debtors filed their petition for relief under Chapter 7 of the Bankruptcy Code. The trial in the state court matter commenced on October 21, 1985;

on the same day, National Union filed its petition of intervention. The trial court severed National Union's claim from the other claims, to be tried at a later date. On November 8, 1985, the 21st Judicial District Court, Parish of Tangipahoa, rendered judgment in favor of Schwamb and his wife and against Delta in the amount of $1,015,000.00 plus costs. The Louisiana Supreme Court denied Delta's application for writs on March 11, 1988.

On March 15, 1988 counsel for the Schwambs demanded of Delta's counsel that a check in the amount of judgment, including interest and costs be delivered to him by March 21, 1988. By letter of March 22, 1988, Delta delivered to Schwamb's counsel three checks in satisfaction of the judgment, with a reservation concerning the amount of costs due. By letter of March 28, 1988, Schwamb's counsel returned to Delta's counsel three checks, "with the request that in light of the worker's compensation issue, you instead immediately have all of this money placed in the form of one check deposited in the Registry of the 21st Judicial District Court . . . ".

On April 4, 1988, Schwamb, through new counsel, filed in this Court a complaint to compel Delta to file in this Court $1,379,587.57, the amount of the judgment plus interest. This Court on April 5, 1988, ordered Delta to file this sum into the registry of the Court. Delta complied with this Order.

After some dispute as to other outstanding costs, Delta filed into the registry of this Court another check in the amount of $5,287.40, and sent to Schwamb's counsel another check in the amount of $2,151.08. On February 2, 1989, Schwamb's counsel filed in the record of the 21st

Judicial District Court, Parish of Tangipahoa, a Satisfaction of Judgment.

On October 16, 1989, National Union filed an "Amended Petition of Intervention" in the 21st Judicial District Court claiming that Delta owed to National Union $98,086.00 in workmen's compensation benefits that Schwamb had collected from National Union as a result of the accident for which Delta was found liable in the state district court. On December 18, 1989, Delta filed peremptory exceptions and a motion for summary judgment, with a request for imposition of sanctions against National Union. On March 15, 1990, National Union filed in the 21st Judicial District Court a motion for summary judgment against the Schwambs and Delta. On July 18, 1990, the 21st Judicial District Court rendered a judgment decreeing that the exceptions and motions of National Union and Delta were denied. Subsequently, on August 22, 1990, Delta filed in this Court its third party complaint against National Union which included a prayer for injunctive relief.

In its motion for summary judgment, Delta maintains that it owes no further obligations to the Schwambs, National Union or any other party for any amounts in excess of the $1,379,587.57 which it deposited into the registry of the Bankruptcy Court. Moreover, Delta contends that an injunction should be issued prohibiting any party from prosecuting in any court, state or federal, any attempt to compel Delta to pay anyone any amount of money, or any other consideration, in addition to the amount already deposited into the Court's registry.

National Union opposes Delta's motion. National Union maintains that Delta cannot, by the use of Rule 7014 bring National Union in this proceeding as a third party defendant. Thus, National Union claims that this Court should dismiss Delta's third party complaint and allow the state court intervension [sic] to proceed.

Bankruptcy Rule 7014(a) provides in pertinent part:

> "At any time after commencement of the action a defending party, as a third-party plaintiff, may cause a summons and complaint to be served upon a person not a party to the action who is or may be liable to the third-party plaintiff for all or part of the plaintiff's claim against the third-party plaintiff."

As National Union points out in its memorandum, there is no evidence in the adversary proceeding's record or any allegation in Delta's complaint that National Union is liable for the Schwambs' claims in the adversary proceeding. Rather, Delta, through the third party complaint, is denying that it is liable to National Union for the $98,086.00 National Union paid to Schwamb in worker's compensation benefits. Such a practice is not permitted under Rule 7014(a). However, such an action can be brought as a declaratory judgment action pursuant to Bankruptcy Rule 7001, Fed.R.Civ.P. 57, and 28 U.S.C. §2201. Consequently, this Court will dismiss Delta's third party complaint without prejudice, to be refiled, if warranted, as a declaratory judgment action.

The preliminary injunction issued August 28, 1990 enjoining any further state court action remains in effect until further notification by the Court. 11 U.S.C. §105. An appropriate Order will be entered.

New Orleans, Louisiana, this 15th day of January, 1993.

/s/ T. H. Kingsmill, Jr.
T. H. KINGSMILL, JR.
U. S. BANKRUPTCY JUDGE

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF LOUISIANA

IN THE MATTER OF	NUMBER
HOWARD K. SCHWAMB, JR. AND MARY R. SCHWAMB	**ADVERSARY NO. 88-0099-K**
DEBTORS	
HOWARD K. SCHWAMB, JR. AND MARY R. SCHWAMB	Bankruptcy No. 85-00355-K
PLAINTIFFS	
VERSUS	
PAUL H. DUE, DEUTSCH, KERRIGAN & STILES, AND DELTA AIRLINES, INC.	CHAPTER 11

ORDER

This matter came before the Court as a hearing on the motion of Delta Airlines, Inc. ("Delta") for injunctive relief and for summary judgment. National Union Fire Insurance Company ("National Union"), third-party defendant in this proceeding, opposes the motion. After considering the argument of counsel at hearing, the record in the matter, the memoranda filed, the applicable law, and in accordance with the foregoing Reasons for Order,

IT IS ORDERED that the third party complaint of Delta be and it hereby is **Dismissed without prejudice to be refiled, if warranted, as a declaratory judgment action.**

IT IS FURTHER ORDERED that the preliminary injunction issued August 28, 1990 enjoining any further

state court action remain in effect until further notification by this Court.

New Orleans, Louisiana, this 15th day of January, 1993.

/s/ T. H. Kingsmill, Jr.
T. H. KINGSMILL, JR.
U. S. BANKRUPTCY JUDGE

§ 1102. Employee or employer suits against third persons causing injury; notice of filing

A. If either the employee or his dependent or the employer or insurer brings suit against a third person as provided in R.S. 23:1101, he shall forthwith notify the other in writing of such fact and of the name of the court in which the suit is filed, and such other may intervene as party plaintiff in the suit.

B. If compromise with such third person is made by the employee or his dependent, the employer or insurer shall be liable for compensation in excess of the amount recovered against such third person only if written approval of such compromise is obtained from the employer or insurer by the employee or his dependent, at the time of or prior to such compromise. If the employee or his dependent fails to notify the employer or insurer of the suit against the third person or fails to obtain written approval of the compromise from the employer and insurer at the time of or prior to such compromise, the employee or his dependent shall forfeit the right to future compensation, including medical expenses. Notwithstanding the failure of the employer to approve such compromise, the employee's or dependent's right to future compensation in excess of the amount recovered from the compromise shall be reserved upon payment to the employer or insurer of the total amount of compensation benefits, medical benefits, attorney's fees, and penalties, previously paid to or on behalf of the employee, exclusive of attorney's fees arising out of the compromise; except in no event shall the amount paid to the employer or insurer exceed fifty percent of the total amount recovered from the compromise.

C. (1) When a suit has been filed against a third party defendant in which the employer or his insurer has intervened, if the third party defendant or his insurer fails to obtain written approval of the compromise from the employer or his insurer at the time of or prior to such compromise and the employee fails to pay to the employer or his insurer the total amount of compensation benefits and medical benefits out of the funds received as a result of the compromise, the third party defendant or his insurer shall be required to reimburse the employer or his insurer to the extent of the total amount of compensation benefits and medical benefits previously paid to or on behalf of the employee to the extent said amounts have not been previously paid to the employer or his insurer by the employee pursuant to the provisions of Subsection B of this Section. Notwithstanding such payment, all rights of the employer or his insurer to assert the defense provided herein against the employee's claim for future compensation or medical benefits shall be reserved.

(2) However, the employer or his insurer may not unreasonably refuse to approve a final, good faith settlement agreed upon and tendered to the employer or his insurer by the employee and the third party defendant. Refusal by the employer or his insurer to approve a good faith, final settlement will be prima facie unreasonable if the amount of the tendered settlement is greater than the discounted value of future compensation and medical benefits. If the employer's or his insurer's refusal is unreasonable,

(a) The employer's or his insurer's credit against future compensation due to the

employee will be reduced by fifty percent of that portion of a subsequent judgment obtained against the third party defendant that is in excess of the tendered final good faith settlement offer and

(b) The employee will be entitled to reasonable attorney's fees from the employer or his insurer, which attorney's fees will be awarded considering only that portion of the judgment in excess of the tendered final good faith settlement offer.

(3) If the employee brings suit against more than one third party, limitation on the employer's or his insurer's credit as specified hereinabove, shall be applicable only to such third party tendering to employer or his insurer a final, good faith settlement with employee, and the limitation on the employer's or his insurer's will not be applicable to judgment secured by employee against any other third party.

(4) Nothing herein shall be interpreted to affect the rights of the employer or his insurer to otherwise seek reimbursement for past or future compensation benefits and medical benefits against a third party defendant or his insurer without regard to the actions of the employee on whose behalf said compensation and medical benefits were paid.

Amended by Acts 1983, 1st Ex.Sess., No. 1, § 1, eff. July 1, 1983; Acts 1984, No. 852, § 1.

§ 1102. Employee or employer suits against third persons causing injury; notice of filing

[See main volume for A]

B. If a compromise with such third person is made by the employee or his dependents, the employer or insurer shall be liable in the employee or his dependents for any benefits under this Chapter which are in excess of the full amount paid by such third person, only after the employer or the insurer receives a dollar for dollar credit against the full amount paid in compromise less attorney fees and costs paid by the employee in prosecution of the third party claim and only if written approval of such compromise is obtained from the employer or insurer by the employee or his dependent, at the time of or prior to such compromise. Written approval of the compromise must be obtained from the employer if the employer is self-insured, either in whole or in part. If the employee or his dependent fails to notify the employer or insurer of the suit against the third person or falls to obtain written approval of the compromise from the employer and insurer at the time of or prior to such compromise, the employee or his dependent shall forfeit the right to future compensation, including medical expenses. Notwithstanding the failure of the employer to approve such compromise, the employee's or dependent's right to future compensation in excess of the amount recovered from the compromise shall be reserved upon payment to the employer or insurer of the total amount of compensation benefits, and medical benefits, previously paid to or on behalf of the employee, exclusive of attorney fees arising out of the compromise; except in no event shall the amount paid to the employer or insurer exceed fifty

percent of the total amount recovered from the compromise. Such reservation shall only apply after the employer or insurer receives a dollar for dollar credit against the full amount paid in compromise, less attorney fees and costs paid by the employee in prosecution of the third party claim.

Amended by Acts 1985, No. 926, § 1, eff. Jan. 1, 1986; Acts 1989 No. 454, § 4, eff. Jan. 1, 1900.

C. (1) When a suit has been filed against a third party defendant in which the employer or his insurer has intervened, if the third party defendant or his insurer fails to obtain written approval of the compromise from the employer or his insurer at the time of or prior to such compromise and the employee fails to pay to the employer or his insurer the total amount of compensation benefits and medical benefits out of the funds received as a result of the compromise, the third party defendant or his insurer shall be required to reimburse the employer or his insurer to the extent of the total amount of compensation benefits and medical benefits previously paid to or on behalf of the employee to the extent said amounts have not been previously paid to the employer or his insurer by the employee pursuant to the provisions of subsection B of this Section. Notwithstanding such payment, all rights of the employer or his insurer to assert the defense provided herein against the employee's claim for future compensation or medical benefits shall be reserved.

(2) Nothing herein shall be interpreted to affect the rights of the employer or his insurer to otherwise seek reimbursement for past or future compensation benefits

and medical benefits against a third party defendant or his insurer without regard to the actions of the employee on whose behalf said compensation and medical benefits were paid.

Redesignated from C(4) to C(2) by Acts 1989. No. 454, § 10, eff. Jan. 1, 1989.

(3) Repealed by Acts 1989, No. 454, § 10, eff. Jan. 1, 1990.

(4) Redesignated as C(2) by Acts 1989, No. 454, § 10, eff. Jan. 1, 1990.

§ 1103. Damages; apportionment of between employer and employee in suits against third persons; compromise of claims

A. (1) In the event that the employer or the employee or his dependent becomes party plaintiff in a suit against a third person, as provided in R.S. 23:1102, and damages are recovered, such damages shall be so apportioned in the judgment that the claim of the employer for the compensation actually paid shall take precedence over that of the injured employee or his dependent; and if the damages are not sufficient, or are sufficient only to reimburse the employer for the compensation which he has actually paid, such damages shall be assessed solely in his favor; but if the damages are more than sufficient to so reimburse the employer, the excess shall be assessed in favor of the injured employee or his dependent, and upon payment thereof to the employee or his dependent, the liability of the employer for compensation shall cease for such part of the compensation due, computed at six percent per annum, and shall be satisfied by such payment. The employer's credit against its future compensation obligation shall be reduced by the amount of attorney fees and court costs paid by the employee in the third party suit.

(2) No compromise with such third person by either the employer or the injured employee or his dependent shall be binding upon or affect the rights of the others unless assented to by him.

B. The claim of the employer shall be satisfied in the manner described above from the first dollar of the judgment without regard to how the damages have been

itemized or classified by the judge or jury. Such first dollar satisfaction shall be paid from the entire judgment, regardless of whether the judgment includes compensation for losses other than medical expenses and lost wages.

C. If either the employer or employee intervenes in the third party suit filed by the other, the intervenor shall only be responsible for reasonable legal fees and costs incurred by the attorney retained by the plaintiff. Such reasonable legal fees shall not exceed one third of the intervenor's recovery for pre-judgment payments or pre-judgment damages. The employee as intervenor shall not be responsible for the employer's attorney fees attributable to post-judgment damages nor will the employer as intervenor be responsible for the attorney fees attributable to the credit given to the employer under Paragraph A of this Section.

Amended by Acts 1989, No. 454, § 4, eff. Jan. 1, 1990.

Supreme Court, U.S.
FILED
MAY 17 1995
OFFICE OF THE CLERK

(2)

No. 94-1683

In The

Supreme Court of the United States

October Term, 1994

DELTA AIRLINES, INC.,

Petitioner,

versus

NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PENNSYLVANIA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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May 17, 1995

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QUESTIONS PRESENTED FOR REVIEW

1. Did a bankruptcy court have subject matter jurisdiction of an adversary proceeding against a non-party to any prior proceedings in bankruptcy court, when the adversary proceeding was filed five years after the underlying bankruptcy was dismissed?

2. After dismissal of the debtor's bankruptcy case, did a bankruptcy court have authority to enter a permanent injunction in favor of a non-debtor against further proceedings in state court by a non-party to any prior proceedings in the bankruptcy court?

PARTIES TO THE PROCEEDINGS

The parties to the proceeding in the court whose judgment is sought to be reviewed, and their parent companies and non-wholly-owned subsidiaries, were:

Petitioner, Delta Airlines, Inc.;

Respondent, National Union Fire Insurance Company of Pittsburgh, Pennsylvania ("National Union");

American International Group (AIG), parent company of National Union;

Howard K. Schwamb, Jr. and Mary Schwamb ("the debtors"), former debtors in bankruptcy court and plaintiffs in a personal injury action in Louisiana state court;

Paul Dué, Rick Caballero, and the law firm of Dué, Smith & Caballero, former counsel for the debtors in Louisiana state court; and

Eric A. Holden, Patricia A. Garcia, and the law firm of Holden & Garcia, former counsel for the debtors in bankruptcy court.

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OFFICIAL AND UNOFFICIAL REPORTS OF OPINIONS

Petitioner, Delta Airlines, Inc., included in its appendix the unofficial reports of opinions delivered in this case by other courts or administrative agencies.

JURISDICTION

Petitioner, Delta Airlines, Inc., invokes the jurisdiction of this Court pursuant to Title 28 U.S.C. § 1254(1) to review by writ of certiorari the February 10, 1995 and March 9, 1995 per curiam decisions of the U.S. Fifth Circuit Court of Appeals.

CONSTITUTIONAL AND STATUTORY PROVISIONS

The constitutional provisions, treaties, statutes, ordinances, and regulations involved in the case are set out verbatim below.

Title 28 U.S.C. § 151 provides that:

In each judicial district, the bankruptcy judges in regular active service shall constitute a unit of the district court to be known as the bankruptcy court for that district. Each bankruptcy judge, as a judicial officer of the district court, may exercise the authority conferred under this chapter with respect to any action, suit, or proceeding and may preside alone and hold a regular or special session of the court, except as otherwise provided by law or by rule or order of the district court.

Title 28 U.S.C. § 157(a) provides that:

Each district court may provide that any or all cases under title 11 and any or all proceedings arising under title 11 or arising in or related to a case under title 11 shall be referred to the bankruptcy judges for the district.

Title 28 U.S.C. § 1334(a) and (b) provides that:
(a) Except as provided in subsection (b) of this section, the district court shall have original and exclusive jurisdiction of all cases under title 11.
(b) Notwithstanding any Act of Congress that confers exclusive jurisdiction on a court or courts other than the district court, the district courts shall have original but not exclusive jurisdiction of all civil proceedings arising under title 11, or arising in or related to cases under title 11.

Title 28 U.S.C. § 1367(a) provides that:
Except as provided in subsections (b) and (c) or as expressly provided otherwise by Federal statute, in any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution. Such supplemental jurisdiction shall include claims that involve the joinder or intervention of additional parties.

Title 28 U.S.C. § 2283 provides that:
A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgment.

Title 11 U.S.C. § 105(a) provides that:
The court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title. No provision of this title providing for the raising of an issue by a party in interest shall be construed to preclude the court from, sua sponte, taking any action or making any determination necessary or appropriate to enforce or implement court orders or rules, or to prevent an abuse of process.

Rule 1.05 of the Uniform Local Rules of the United States District Court for the Eastern District of Louisiana ("ULLR") provides that:

> *Whenever a civil matter, commenced in or removed to the court, involves subject matter that either comprises all or a material part of the subject matter or operative facts of another action, whether civil or criminal, then pending before this or another court or an administrative agency, or previously dismissed or decided by this court, counsel shall append on a separate sheet of paper, to the front of the complaint, a list and description of all such actions then known to counsel and a brief summary of the relationship. If information concerning any such action or proceeding is obtained subsequent to the filing of the original pleading in the latter case, it shall be the duty of counsel obtaining such information to notify the court and opposing counsel in writing of the information so received in the same manner.*

The Order of Reference of Bankruptcy Cases and Proceedings of the United States District Court for the Eastern District of Louisiana ("Order of Reference") provides that:

> *It is ORDERED that the Order of Reference of Bankruptcy Cases and Proceedings entered on August 2, 1984 is hereby withdrawn, vacated and set aside and the following order is entered in its place.*
>
> *Pursuant to 28 U.S.C. Section 157, it is hereby ORDERED that any or all cases under Title 11 or any or all proceedings arising under Title 11 or arising in or related to a case under Title 11 filed in or transferred or removed to this district be and they hereby are referred to the Bankruptcy Judges of this district for consideration and resolution consistent with law.*
>
> *It is further ORDERED that the Bankruptcy Judges for the Eastern District of Louisiana be, and they*

hereby are, directed to exercise the authority and responsibilities conferred upon them as Bankruptcy Judges by 28 U.S.C. Section 151 et seq. and this court's order of reference, as to all cases and proceedings covered by this order.

In accordance with 28 U.S.C. Section 157(b)(5), it is further ORDERED that all personal injury tort and wrongful death claims shall be tried in, or as determined by, this court and shall not be referred by this order.

So ORDERED this 30th day of March, 1990.

STATEMENT OF THE CASE

Respondent, National Union Fire Insurance Company of Pittsburgh, Pennsylvania ("National Union"), submits this statement of the case to address perceived misstatements of fact in the statement of the case submitted by petitioner, Delta Airlines, Inc. ("Delta").

On January 14, 1984, Howard K. Schwamb, Jr. and Mary Schwamb (together, "the Schwambs" or "the debtors") filed a personal injury suit against Delta in Louisiana state court (App. 5). On October 21, 1985, National Union intervened in that suit to recover workers' compensation payments to the Schwambs, but the state court severed National Union's claims from trial of the principal claims (App. 5). The Schwambs ultimately won a judgment of over $1 million against Delta in state court (App. 5), but in March 1988 their counsel returned the checks tendered by Delta to satisfy the judgment, suggesting to Delta that "in light of the worker's compensation issue, you instead immediately have all of this money" deposited in the state court registry (App. 5-6).

On April 4, 1988, acting through new counsel, the Schwambs moved in bankruptcy court to compel Delta to deposit the funds instead in the registry of the bankruptcy court (App. 6), where the Schwambs had filed a petition under Chapter 7 of the Bankruptcy Code (App. 23). The bankruptcy court granted the Schwambs' motion on April 5, 1988 and Delta deposited the funds in the registry of the bankruptcy court (App. 6, 24). The Schwambs' creditors were paid and the Schwambs' bankruptcy was dismissed (App. 6). Delta did not notify the bankruptcy court of National Union's intervention in state court and did not notify National Union of the motion to compel satisfaction of the state court judgment in the bankruptcy court (App. 7).

On February 2, 1989, the Schwambs filed a satisfaction of judgment in Louisiana state court (App. 6). On October 16, 1989, National Union filed an amended petition of intervention in state court claiming that Delta had also become liable to National Union for the workers' compensation payments to the Schwambs (App. 6). Delta's motion for summary judgment in state court was denied (App. 6). On August 28, 1990, Delta filed a third-party complaint in a still-pending adversary action in bankruptcy court (App. 6-7), but the complaint was dismissed as improper on January 15, 1993 (App. 7, 23-27).

Delta then commenced a new adversary proceeding seeking to prevent National Union from seeking relief against Delta in state court, and National Union sought damages for Delta's failure to notify the bankruptcy court or National Union of the full scope of proceedings involving the funds used to satisfy the state court judgment (App. 7). On October 29, 1993, the bankruptcy court granted Delta's motion for summary judgment and

denied National Union's cross-motion for summary judgment, issuing a permanent injunction barring all parties from pursuing any claims against Delta related to Delta's April 1988 deposit of funds into the registry of the bankruptcy court (App. 7).

National Union appealed the bankruptcy court's issuance of the injunction to the district court, which reversed for lack of subject matter jurisdiction under 28 U.S.C. § 1334 and lack of authority under 11 U.S.C. § 105 (App. 3-12). Delta appealed to the U.S. Fifth Circuit Court of Appeals, which affirmed the district court's ruling based on lack of subject matter jurisdiction (App. 1-2) and denied Delta's petition for rehearing *en banc* (App. 3-4).

Delta then filed a petition for writ of certiorari in this Court.

BASIS FOR FEDERAL JURISDICTION

Jurisdiction pursuant to 28 U.S.C. § 1334 was lacking in the court of first instance, the United States Bankruptcy Court for the Eastern District of Louisiana.

ARGUMENTS FOR DENYING THE PETITION

Summary of Argument

Delta's petition for writ of certiorari should be denied first because the bankruptcy court lacked subject matter jurisdiction under 28 U.S.C. §§ 151, 157, 1334, and 1367 and the Order of Reference by the U.S. District Court for the Eastern District of Louisiana. The petition should also be denied because the bankruptcy court lacked authority to issue the disputed injunction under 11 U.S.C. § 105 and 28 U.S.C. § 2283. Finally, Delta's petition should also be denied because Delta was not deprived of

property without due process of law in violation of the Fifth Amendment to the U.S. Constitution.

(i) The Fifth Circuit and the district court properly found no subject matter jurisdiction under 28 U.S.C. § 1334.

The Fifth Circuit has held that the test for determining bankruptcy jurisdiction under 28 U.S.C. § 1334 is "whether the outcome of [the] proceeding could *conceivably* have any effect on the estate being administered in bankruptcy." *Matter of Wood*, 825 F.2d 90, 93 (5th Cir. 1987), quoting *Pacor, Inc. v. Higgins*, 743 F.2d 984, 994 (3d Cir. 1984) (emphasis supplied in *Wood*); *see also In re Spaulding & Co.*, 131 B.R. 84, 88 (N.D.Ill. 1990). As pointed out by the district court, the bankruptcy court could not have jurisdiction of Delta's request for injunctive relief in the instant case, because the debtors' bankruptcy was dismissed, and there is no estate in bankruptcy (App. 6, 8-10).

National Union was never a party to any aspect of the bankruptcy proceedings, and "jurisdiction over non-bankruptcy controversies with third parties who are otherwise strangers to the civil proceeding and to the parent bankruptcy does not exist." *In re Haug*, 19 B.R. 223, 224-225 (Bankr. D.Ore. 1982), quoted in *Pacor, supra*, 743 F.2d at 994 (3d Cir. 1984).

The situation in this case is exactly the situation proscribed in *In re Haug, supra*. National Union, left out of the bankruptcy proceedings, should not fall prey years later to a new adversary proceeding filed in a dismissed bankruptcy. Subject matter jurisdiction simply does not exist in that context, because the requisite effect on the bankruptcy proceedings is impossible if the bankruptcy

was dismissed, and because jurisdiction cannot arise from some conceivable effect that the bankruptcy proceedings might have had on National Union's claims against Delta or the debtors. *Matter of Majestic Energy Corp.*, 835 F.2d 87, 90-91 (5th Cir. 1988); *In re Alpha Steel Co., Inc.*, 142 B.R. 465, 469-470 (M.D.Ala. 1992); *cf. In re Marine Iron & Shipbuilding Co.*, 104 B.R. 976, 986 (D.Minn. 1989) (neither cross-relationship of claims nor statutory source of federal jurisdiction over debtor's claim supported assertion of pendent-party jurisdiction).

In its petition to this Court, Delta raises new arguments about a bankruptcy court's jurisdiction of an adversary proceeding notwithstanding dismissal of the underlying bankruptcy case. However, not one case cited by Delta involves the exercise of jurisdiction under § 1334 in a new adversary proceeding filed after dismissal of the principal bankruptcy case and involving a defendant who was not party to any prior bankruptcy proceedings.

For example, Delta cites a number of decisions involving the bankruptcy courts' ancillary jurisdiction over still-pending adversary proceedings[1] or still-pending matters removed from state court as bankruptcy-

[1] *In re Morris*, 950 F.2d 1531 (9th Cir. 1992) (adversary proceeding left unresolved after Chapter 11 case was dismissed); *In re Universal Farming Industries*, 873 F.2d 1334 (9th Cir. 1989) (controversy between two creditors not moot after dismissal of underlying bankruptcy case); *In re Smith*, 866 F.2d 576 (3d Cir. 1989) (adversary proceeding left unresolved after Chapter 13 case was converted into Chapter 7 liquidation); *In re Roma Group, Inc.*, 137 B.R. 148 (Bankr. S.D.N.Y. 1992) (jurisdiction retained over part of adversary proceeding after involuntary dismissal of two Chapter 11 cases); *In re Stardust Inn, Inc.*, 70 B.R. 888 (Bankr. E.D.Pa. 1987) (adversary proceeding left unresolved after voluntary dismissal of Chapter 11 cases); *In re Pocklington*, 21 B.R. 199 (Bankr. S.D.Ca. 1982)

related,[2] even after voluntary or involuntary dismissal of the underlying bankruptcy cases. Delta also cites other decisions involving a bankruptcy court's authority to enter judgments after dismissal of a bankruptcy on matters tried or decided pre-dismissal,[3] the similar authority to enforce a settlement agreement which had ended an adversary proceeding,[4] or the authority to hear a declaratory judgment action to interpret its own prior lift stay order.[5]

(adversary proceeding filed before voluntary dismissal of Chapter 13 case); *In re Lake Tahoe Land Co., Inc.*, 12 B.R. 479 (Bankr. D.Nev. 1981) (adversary proceeding filed before involuntary dismissal of Chapter 11 case).

[2] *In re Carraher*, 971 F.2d 327 (9th Cir. 1992) (still-pending fraud claims removed from state court as related to a then-pending bankruptcy case which was later dismissed).

[3] *In re Porges*, 157 B.R. 212 (Bankr. E.D.N.Y. 1993) (judgment properly entered even after debtor's voluntary dismissal of Chapter 13 case, when bankruptcy court had already decided on the debtor's objection to a creditor's claims after full day trial); *In re Lawson*, 156 B.R. 43 (Bankr. 9th Cir. 1993) (judgment entered after dismissal of Chapter 11 case on final fee awards decided before dismissal of Chapter 11 case).

[4] *In re Fleet Service Corp., Inc.*, 144 B.R. 909 (Bankr. M.D.Fla. 1992) (ancillary jurisdiction existed to rule on debtor's motion to enforce settlement in adversary proceeding, even after dismissal of underlying Chapter 11 case).

[5] *In re Franklin*, 802 F.2d 324 (9th Cir. 1986). Delta also cites two other decisions with no relation to this case, *In re Moseley*, 161 B.R. 382 (Bankr. E.D.Tex. 1993) (adversary proceedings still in early stages were dismissed along with bankruptcy because no prejudice would result to parties in adversary proceeding); *Un-Common Carrier Corp. v. Oglesby*, 98 B.R. 751 (S.D.Miss. 1989) (same, plus no other jurisdictional grounds to retain patent licensing dispute initially brought as adversary proceeding in bankruptcy court and then transferred to district court).

None of those cases bear any similarity to this case, in which Delta brought a new adversary proceeding against National Union in 1993, five years after dismissal of the underlying bankruptcy case.[6] This case more resembles the situation at issue in another decision cited by Delta, in which the Ninth Circuit first acknowledged a bankruptcy court's continuing jurisdiction "to *interpret* orders entered prior to dismissal of the underlying bankruptcy case"[7] and "to dispose of ancillary matters such as an application for an award of attorney's fees for services rendered in connection with the underlying action,"[8] but then emphasized that "[t]he bankruptcy court does not have jurisdiction . . . to grant new relief independent of its prior ruling once the underlying action has been dismissed."[9]

Delta tries to tie its adversary proceeding, filed in 1993, to an apparently still-pending adversary proceeding filed in 1988, claiming that the bankruptcy court's continuing jurisdiction and authority over the 1988 proceeding "cloaked Adversary Proceeding 93-1027-THK, the

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[6] Delta first named National Union as a third-party defendant in Adversary Proceeding No. 88-0099, which was commenced before dismissal of the underlying bankruptcy. The bankruptcy court dismissed the third-party complaint as improper, because Delta did not allege that National Union was liable for any part of the debtors' claim against Delta in the adversary proceeding. (*See* App. 21-29.)

[7] *In re Taylor*, 884 F.2d 478, 481 (9th Cir. 1989) (emphasis in *Taylor*), citing *Beneficial Trust Deeds v. Franklin (In re Franklin)*, 802 F.2d 324, 326-327 (9th Cir. 1986).

[8] *Id.*, citing *USA Motel Corp. v. Danning*, 521 F.2d 117 (9th Cir. 1975).

[9] *Id.*, citing *Armel Laminates, Inc. v. Lomas & Nettleton Co. (In re Income Property Builders, Inc.)*, 699 F.2d 963, 964 (9th Cir. 1982).

Complaint for Declaratory Judgment filed by Delta at the invitation of the bankruptcy court to replace Delta's third party complaint in Adversary Proceeding 88-0099K." (Delta's Petition at p. 13.) That assertion runs directly afoul of the above-quoted rules that "[t]he bankruptcy court does not have jurisdiction . . . to grant new relief independent of its prior ruling once the underlying action has been dismissed"[10] and that "jurisdiction over non-bankruptcy controversies with third parties who are otherwise strangers to the civil proceeding and to the parent bankruptcy does not exist."[11]

Finally, Delta argues that the bankruptcy court has authority to render declaratory relief under 28 U.S.C. § 2201. Bankruptcy courts may indeed possess the authority to grant declaratory relief, but only if they have subject matter jurisdiction:

> If proceedings involve declaratory relief, they are subject to the general jurisdictional and referral provisions of 28 U.S.C. § 1334 and 28 U.S.C. § 157, respectively. Section 2201 is not a grant of jurisdiction to the federal courts, but only makes available an additional remedy in cases over which those courts already have jurisdiction.

1 *Collier on Bankruptcy* § 3.01[10] at pp. 3-126 to 3-127 (15th ed. 1993).

In sum, both the Fifth Circuit and the district court acted properly when they applied 28 U.S.C. § 1334 to the facts of this case and ruled that the bankruptcy court

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[10] *In re Taylor*, 884 F.2d 478, 481 (9th Cir. 1989).

[11] *In re Haug*, 19 B.R. 223, 224-225 (Bankr. D.Ore. 1982), quoted in *Pacor, supra*, 743 F.2d at 994 (3d Cir. 1984).

lacked jurisdiction to hale National Union into bankruptcy court five years after dismissal of the underlying bankruptcy.

(ii) The bankruptcy court lacked ancillary or supplemental jurisdiction.

As two additional, intertwined arguments, Delta asserts that the bankruptcy court had "ancillary" jurisdiction of its request for injunctive relief or, alternatively, supplemental jurisdiction pursuant to 28 U.S.C. § 1367. These arguments are also flawed, because Delta did not seek to adjudicate a "supplemental and ancillary bill in equity" (*see* Petition at p. 21) and because bankruptcy courts do not have jurisdiction under § 1367.

First, in its "ancillary jurisdiction" argument, Delta relies upon a series of decisions distinguishable on their face from this case. For example, in *Local Loan Co. v. Hunt*, 292 U.S. 234, 54 S.Ct. 695, 78 L.Ed. 1230 (1934), this Court held that an assignment of future wages was covered by the debtor's discharge in bankruptcy, when the debtor "includ[ed] in his schedule of liabilities" the loan that was to have been repaid with the wages. *Id.*, 292 U.S. at 238, 54 S.Ct. at 696. Unlike in *Hunt*, no discharge is involved in this case. Also unlike in *Hunt*, Delta could have avoided the dilemma it later sought to avoid, as indicated by the bankruptcy court's comment that "[t]he Court feels that an injustice has been done and that if notice had been sent to all interested parties, we would not be here today."[12]

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[12] *See* August 17, 1993 Minute Entry, U.S. Bankruptcy Court for Eastern District of Louisiana at p. 2 (App. 20).

In the instant case, neither the debtors nor Delta ever informed the bankruptcy court of National Union's claim to the money paid by Delta and distributed by the bankruptcy court, and neither Delta nor the debtors informed National Union of the proceedings in bankruptcy court (App. 7). That lack of notice to either National Union or the bankruptcy court also distinguishes this case from the other decisions cited by Delta for general propositions such as a court's ability to enforce its own prior orders,[13] or the equitable power of the bankruptcy courts.[14]

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[13] *E.g., Royal Ins. Co. of America v. Quinn-L Capital Corp.*, 960 F.2d 1286, 1297-1298 (5th Cir. 1992) (injunction of investors' state court suit against insurer was properly based on prior declaratory judgment of no insurance coverage to corporation, when investors brought claims as assignees of sole stockholder in corporation); *Southmark Properties v. Charles House Corp.*, 742 F.2d 862, 870 (5th Cir. 1984) (judgment ordering and confirming sale of property precluded claims of fraud related to sale of property, when claims were made by party to sale and party who was active in reorganization proceeding or was at least a privy of party to reorganization); *In re Unioil*, 948 F.2d 678, 682 (10th Cir. 1991) (enjoining vice president of debtor corporation from further post-petition transfers and payments); *Matter of Barnes*, 969 F.2d 526, 528 (7th Cir. 1992) (enjoining state court suit to collect unlisted debt, because creditor had notice of bankruptcy proceeding); *but see Kokkonen v. Guardian Life Ins. Co. of Am.*, 62 U.S.L.W. 4313, 114 S.Ct. 1673, 128 L.Ed.2d 391 (1994) (ancillary jurisdiction did not allow court to enforce prior settlement agreement because (a) same facts were not involved and (b) dismissal order did not require performance of settlement agreement or purport to retain jurisdiction over settlement).

[14] *E.g., Pepper v. Litton*, 308 U.S. 295, 60 S.Ct. 238, 84 L.Ed. 281 (1939) (equitable subordination of claim); *FDIC v. Colonial Realty Co.*, 966 F.2d 57, 60-61 (2d Cir. 1992) (equitable basis for substantive consolidation of estates of partnership and general partners); *In re Octagon Roofing*, 157 B.R. 852, 856-857 (N.D.Ill. 1993) (equitable subordination of claim); *M. Prusman, Ltd. v.*

Other cases cited by Delta are also completely inapplicable to the facts of this case. For instance, *Dugas v. American Surety Co. of New York*, 300 U.S. 414, 57 S.Ct. 515, 81 L.Ed. 720 (1937) involved a suit against the surety on an appeal bond, by a party who did not recover his entire judgment because of another judgment rendered in a federal interpleader action. No interpleader was involved here. National Union also was not a party to any bankruptcy proceeding – certainly not one in which the court explicitly retained jurisdiction to ensure enforcement of its orders, as in *State of Michigan v. City of Allen Park*, 739 F.Supp. 1102, 1106 (E.D.Mich. 1990), *aff'd*, 954 F.2d 1201 (6th Cir. 1992).[15]

Second, Delta's argument of supplemental jurisdiction under 28 U.S.C. § 1367 is undercut by the decisions cited by Delta. In one decision, the court plainly held that § 1367 cannot serve as the basis for bankruptcy court jurisdiction because § 1367 confers jurisdiction only to district courts. The court noted that although 28 U.S.C. § 151 makes the bankruptcy courts units of the district courts, § 151 also limits the bankruptcy judge's authority

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Ariel Maritime Group, Inc., 781 F.Supp. 248, 252 (S.D.N.Y. 1991) (enforcement of prior judgments by collateral estoppel and piercing of corporate veil).

[15] Delta also was not ignorant of conflicting claims to the money it paid into the registry of the bankruptcy court. Nonetheless, Delta did not inform the court of National Union's competing claim to that money, and thus cannot claim the type of protection accorded to an innocent purchaser in another case cited by Delta. *Julian v. Central Trust Co.*, 193 U.S. 93, 24 S.Ct. 399, 48 L.Ed. 629 (1904) (allowing injunction of state court proceeding against property, when judgment in state court was rendered against prior owner, in suit in which purchaser of property through judicial sale in federal court was not a party).

to "Title 28, chapter 6, specifically § 157." *In re Fisher*, 151 B.R. 895, 899 (Bankr. N.D.Ill. 1993).

Section 157(a) provides that a district court "may provide that any or all cases under title 11 and any or all proceedings arising under title 11 or arising in or related to a case under title 11 shall be referred to the bankruptcy judges for the district." The U.S. District Court for the Eastern District of Louisiana entered an order pursuant to § 157(a), providing that "any or all cases under Title 11 or any or all proceedings arising under Title 11 or arising in or related to a case under Title 11 filed in or transferred or removed to this district" be referred to the bankruptcy Judges of the district.[16] The same phraseology was used in the order of reference that applied in *In re Fisher, supra.*

The court in *In re Fisher* noted that the only "other law" referred to in § 151 that might be applicable was § 1367, which applied only to district courts. *In re Fisher*, 151 B.R. 895, 899 (Bankr. N.D.Ill. 1993). The order of reference in that case, as in this case, had not provided for the referral of jurisdiction under § 1367, and even if it had, "[a]ny additional referral of jurisdiction beyond that allowed by 28 U.S.C. § 157(a) would be subject to significant constitutional concerns." *Id.*, 151 B.R. at 899 n.4 (Bankr. N.D.Ill. 1993).

The other cases cited by Delta involve the exercise of removal jurisdiction over claims between parties already joined in a bankruptcy-related case,[17] or the exercise of

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[16] *See* March 30, 1990 Order of Reference of Bankruptcy Cases and Proceedings of the United States District Court for the Eastern District of Louisiana.

[17] In one decision, a state court legal malpractice case was removed to a bankruptcy court which had earlier approved an

pendent-party jurisdiction over third-party defendants.[18] As discussed above, Delta's effort to block National Union's claim in state court was not sufficiently related to the bankruptcy case to fall within § 1334's broad jurisdictional grant as to cases "arising in or related to cases under title 11" because "jurisdiction over nonbankruptcy controversies with third parties who are otherwise strangers to the civil proceeding and to the parent bankruptcy does not exist." *In re Haug*, 19 B.R. 223, 224-225 (Bankr. D.Ore. 1982).

Because Delta's claims were not even "related to" a case under Title 11, it makes no sense for Delta to claim that its attempt to block National Union's claims were "so related" to claims in the prior adversary proceeding as to form part of the "same case or controversy" under § 1367.

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award of fees to the malpractice defendant. The bankruptcy court held that it had supplemental jurisdiction of the malpractice case because the quality, reasonableness and necessity of the attorney's work were essential facts of both matters so as to make the malpractice case part of same case or controversy with the attorneys' fee litigation in the still-ongoing bankruptcy case. *In re W.J. Services, Inc.*, 139 B.R. 824 (Bankr. S.D.Tex. 1992). That analysis seems unnecessary in light of the more straightforward basis for removal jurisdiction under 28 U.S.C. §§ 1334 and 1452. *See, e.g., In re Griffith*, 6 B.R. 753 (Bankr. D.N.M. 1980) (entire case and not just claim by debtors could be removed pursuant to former bankruptcy-related removal statute, 28 U.S.C. § 1478).

[18] *In re Joint Eastern & Southern District Asbestos Litigation*, 769 F.Supp. 85, 86-87 (E. & S.D.N.Y. 1991) (Weinstein, J.) (pendent-party jurisdiction exercised pursuant to 28 U.S.C. § 1367 over third-party defendants). In contrast, the bankruptcy court in this case dismissed Delta's third-party complaint against National Union in the pre-existing adversary proceeding, because Delta could state no claim under Bankruptcy Rule 7014, the bankruptcy counterpart to Federal Rule of Civil Procedure 14. (*See* App. 23-29).

It also makes no sense for Delta to try to invoke the supplemental jurisdiction of the bankruptcy court over the last two years, to the point of petitioning this Court for certiorari, all to block a half-day trial on a $100,000 workers' compensation claim in Louisiana state court. Delta's position, lacking in practical sense, lacks legal justification just as plainly: if Delta's claims were not sufficiently "related to" a bankruptcy case to permit jurisdiction under 28 U.S.C. § 1334(a) or (b), then Delta's claims certainly were not so interwoven with the bankruptcy to permit jurisdiction under 28 U.S.C. § 1367. Delta's petition should therefore be denied as to any claims of supplemental jurisdiction.

(iii) The bankruptcy court lacked authority to issue the disputed injunction pursuant to 11 U.S.C. § 105.

Delta claims that the bankruptcy court had authority to issue the disputed injunction pursuant to 11 U.S.C. § 105. Section 105(a) authorizes the bankruptcy courts to "issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title." It does not authorize boundless intervention by the bankruptcy courts:

> [I]t should be universally recognized that the power granted to the bankruptcy courts under section 105 is not limitless and should not be employed as a panacea for all ills confronted in the bankruptcy case. Section 105 does not allow the bankruptcy court to override explicit mandates of other sections of the Bankruptcy Code or mandates of other state and federal statutes.

2 *Collier on Bankruptcy* ¶ 105.01[3] at p. 105-4 (15th ed. 1993).

The courts have generally found that only limited authority exists to enjoin third parties under § 105, such that "the court must find that failure to enjoin would affect the bankruptcy estate and would adversely or detrimentally influence and pressure the debtor through that third party." *In re Otero Mills, Inc.*, 21 B.R. 777, 778 (Bankr. D.N.M. 1982), *aff'd*, 25 B.R. 1018 (D.N.M. 1982).

Delta's potential liability to National Union simply could not threaten the bankruptcy estate of the former debtors as required under *Otero*. For one thing, Delta sought a permanent injunction long after the bankruptcy estate ceased to exist and the debtors' bankruptcy case was dismissed. Even if a bankruptcy estate were at issue, National Union could not "detrimentally influence" or "pressure" the debtors through Delta. The debtors already owed National Union reimbursement for workers' compensation payments, and National Union seeks to hold Delta liable for acting in a way that defeated or at least impaired National Union's ability to collect from the debtors. Delta simply is not a party whose fortunes would have directly affected the debtor.

Like the court in *Otero*, the Fifth Circuit has limited the availability of injunctive relief under § 105, by requiring the relief to be tailored to the Bankruptcy Code's demands:

> [T]he powers granted by [§ 105] may be exercised only in a manner consistent with the provisions of the Bankruptcy Code. [The] statute does not authorize the bankruptcy courts to create substantive rights that are otherwise unavailable under applicable law, or constitute a roving commission to do equity.

United States v. Sutton, 786 F.2d 1305, 1308 (5th Cir. 1986).[19]

In this case, the bankruptcy court improperly relied on § 105 for exactly the purposes proscribed by the Fifth Circuit – for authority "to create substantive rights" and for a "roving commission to do equity."

Delta also lacked standing to seek an injunction under § 105. "Standing to bring the adversary proceeding to enjoin the actions of a third party rests with the debtor, debtor in possession, or the trustee, and not with the third party." 2 *Collier on Bankruptcy* ¶ 105.02[2] at p. 105-10 (15th ed. 1993), citing *In the Matter of Venegas Munoz*, 73 B.R. 283, 285 (Bankr. D.P.R. 1987).

Delta ignores these obstacles to the propriety of the instant injunction, arguing only that § 105 "authorizes bankruptcy courts to issue injunctions and take other necessary steps in aid of their jurisdiction." (Delta's Petition at p. 24, *quoting U.S. v. Sutton, supra.*) Delta's only other argument, that it is "threatened with civil double jeopardy," is absurd, because Delta is furiously trying to avoid returning to the same state court that issued the "final judgment" upon which Delta relies, and which Delta improperly satisfied in bankruptcy court – without informing National Union of its actions and without

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[19] *See also A.H. Robbins Co. v. Piccinin*, 788 F.2d 994, 999-1002 (4th Cir. 1986), *cert. denied*, 479 U.S. 876, 107 S.Ct. 251, 93 L.Ed.2d 177 (1986), *cert. denied sub nom. Committee of Representatives of Dalkon Shield Claimants v. A.H. Robins, Inc.*, 479 U.S. 876, 107 S.Ct. 251, 98 L.Ed.2d 177 (1986) (§ 105(a) stays asked by debtors to restrain extra-bankruptcy actions require unity of interest between debtor and threatened third party, indemnification obligation owing from debtor to threatened third party, or debtor's inevitable, burdensome involvement in ancillary litigation).

informing the bankruptcy court of National Union's claims. Moreover, National Union contests Delta's conduct *after* the final judgment was entered in state court, because Delta effectively settled its obligations with the debtors out of court and without notice to National Union. Potential liability deriving from such post-judgment conduct is not "double jeopardy" in any sense.

In sum, Delta would extend the ambit of § 105 well beyond its bankruptcy-related purposes, and its petition to this Court should thus be denied.

(iv) The bankruptcy court lacked authority to issue the disputed injunction pursuant to 28 U.S.C. § 2283.

Delta also wrongly argues that the bankruptcy court had authority to issue the disputed injunction pursuant to 28 U.S.C. § 2283. The Anti-Injunction Act, 28 U.S.C. § 2283 bars the type of injunction granted by the bankruptcy court in the instant case, unless it falls within one of three limited exceptions:

> A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgment. 28 U.S.C. § 2283.

Delta's arguments fall within the third exception, the "relitigation exception." The Fifth Circuit has explained the scope of this exception:

> The relitigation exception was "designed to permit a federal court to prevent state litigation of an issue that previously was presented to and decided by the federal court. It is founded in the well-recognized concepts of *res judicata* and collateral estoppel." *Chick Kam Choo v. Exxon Corp.*,

> 486 U.S. 140, 147, 108 S.Ct. 1684, 1689-90, 100 L.Ed.2d 127 (1988). The exception applies, however, only if the parties to the original action actually disputed the issue and the trier of fact actually resolved it. *See James Talcott, Inc. v. Allahabad Bank, Ltd.*, 444 F.2d 451, 459-60 (5th Cir.), *cert. denied*, 404 U.S. 940, 92 S.Ct. 280, 30 L.Ed.2d 253 (1971).

Santopadre v. Pelican Homestead & Savings Association, 937 F.2d 268, 273 (5th Cir. 1991). In *Santopadre*, the builders who litigated the specific issue of their alleged 12.5% interest in a property were barred from bringing a new action in Louisiana state court reurging the same claim, because they had raised that claim and it had been decided in the prior federal litigation. *Id.* at 273-274.

In the instant case, Delta asserts the "relitigation" exception with respect to the issue of the forum in which Delta was obligated to satisfy the judgment that it owed the debtors, an issue that existed solely between Delta and the debtors and was litigated solely between Delta and the debtors. Neither Delta nor the debtors gave the bankruptcy court notice of National Union's related claim for reimbursement of workers' compensation benefits, and neither Delta nor the Schwambs gave National Union notice of the bankruptcy proceedings. The situation is thus entirely different from the "relitigation" situation at issue in *Santopadre* and other cases where a party to prior litigation tries to reurge an issue or claim that has already been fully adjudicated.

Delta nonetheless seeks to rely upon the bankruptcy court's April 5, 1988 order, which at most adjudicated the proper forum in which Delta was obligated to satisfy the judgment it owed the debtors. The relitigation exception,

founded in principles of *res judicata* and collateral estoppel, cannot bind National Union, a non-party to that decision, on a different claim and different issues. At most, the relitigation exception can be invoked to expand the scope of a valid injunction to "include those in privity with parties to the federal court action,"[20] or to embrace a non-party whose interest is so closely aligned with an actual party's interests that the party functions as the non-party's "virtual representative."[21] Neither situation exists in the instant case, in which Delta and the debtors effected the equivalent of an illicit, out-of-court settlement without notice to National Union, the payor of workers' compensation benefits.[22]

Both Delta and the debtors left National Union and the bankruptcy court to wander in such a vacuum that the bankruptcy court itself was led to complain that "[t]he Court feels that an injustice has been done and that if notice had been sent to all interested parties, we would not be here today." (App. 20.) Delta offers no cognizable argument to justify its role in creating such a situation, nor any argument to justify the bankruptcy court's injunction as protecting or effectuating its orders and

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[20] *Quintero v. Klaveness Ship Lines*, 914 F.2d 717, 721 (5th Cir. 1990), *cert. denied*, 499 U.S. 925, 111 S.Ct. 1322, 113 L.Ed.2d 255 (1991).

[21] *Benson & Ford, Inc. v. Wanda Petroleum Co.*, 833 F.2d 1172, 1174-1175 (5th Cir. 1987).

[22] *St. Paul Fire & Marine Ins. Co. v. Whitmire*, 578 So.2d 1180, 1183 (La.App.5th Cir. 1991), *writ denied*, 581 So.2d 707 (La. 1991); *Aetna Casualty & Surety Co. v. Hanover Ins. Co.*, 569 So.2d 1078, 1081 (La.App.3d Cir. 1990), *aff'd*, 574 So.2d 363 (La. 1991); *Shiver v. Wilson's Department Store*, 559 So.2d 864 (La.App.4th Cir. 1990).

decrees. Instead, the decisions cited by Delta undermine Delta's contentions.

For example, in *Kokkonen v. Guardian Life Ins. Co. of America*, 62 U.S. 4313, 114 S.Ct. 1673, 128 L.Ed.2d 391 (1994), this Court refused to allow an exercise of ancillary jurisdiction to enforce a settlement agreement when the dismissal order entered by the court neither obligated the parties to perform the agreement nor provided for the court to retain jurisdiction to enforce the agreement. *Kokkonen*, ___ U.S. at ___, 114 S.Ct. at 1677 (1994). In the instant case, the order relied upon by Delta likewise did not even purport to touch upon National Union's claim to the money deposited by Delta into the registry of the bankruptcy court, because Delta failed to inform either the bankruptcy court or National Union of the full scope of proceedings at the time.

In another decision, the federal court enjoined the New York County Public Administrator from restraining a decedent's family members from qualifying as personal representatives in a method already prescribed by the federal court for the purpose of pursuing claims in federal court on behalf of the decedent. *Complaint of Cosmopolitan Shipping Co., S.A.*, 453 F.Supp. 268 (S.D.N.Y. 1978). Delta was not the victim but the perpetrator of efforts to undermine preexisting litigation, with its failure to advise either National Union or the bankruptcy court of the full scope of proceedings in 1988.

In still another decision, the court enjoined the plaintiff in a federal trade secrets case from using material obtained through discovery in that case to pursue a suit that the same plaintiff later filed in state court. *Sperry Rand Corp. v. Rothlein*, 288 F.2d 245 (2d Cir. 1961). Unlike in *Rothlein*, National Union intervened in state court in

1985, and amended its claims to include Delta in 1989 (App. 5-6). Delta first unsuccessfully sought summary judgment against National Union in Louisiana state court, and only later began its lengthy efforts to block National Union in bankruptcy court (App. 25).

The same distinction applies to the decision in *Olin Corp. v. Insurance Co. of North America*, 807 F.Supp. 1143 (S.D.N.Y. 1992), in which the court granted an injunction pursuant to 22 U.S.C. § 2283 to bar Olin from relitigating issues already decided by the federal district court. The court in *Olin* noted this Court's holding that "an essential prerequisite for applying the relitigation exception is that the claims or issues which the federal injunction insulates from litigation in state proceedings actually have been decided by the federal court." *Olin*, 807 F.Supp. at 1153, quoting *Chick Kam Choo v. Exxon Corp.*, 486 U.S. 140, 148, 108 S.Ct. 1684, 1690, 100 L.Ed.2d 127 (1988).[23]

In *Olin*, unlike the instant case, the federal court had decided a choice of law issue prior to Olin's effort to obtain a different ruling in state court, and the federal court thus enjoined relitigation of the issue pursuant to 28 U.S.C. §§ 1651 and 2283.[24] In this case, Delta seeks to bar

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[23] *See also Baker v. Gotz*, 415 F.Supp. 1243 (D.Del. 1976). In that case, a federal court invalidated a sequestration of funds and ordered return of those funds. In a subsequent state court action, plaintiffs obtained another sequestration order and continued to sequester the funds. The federal court ordered return of all funds and enjoined any further sequestration pursuant to state or federal court orders.

[24] Delta cites the All Writs Act, 28 U.S.C. § 1651, only once, and then without any explanation, in its petition to this Court. (Petition at p. 24.) National Union can only infer that Delta refers to the All Writs Act as the jurisdictional basis for the

"relitigation" of an issue never joined, Delta's liability to National Union, against National Union a party left out of the bankruptcy proceedings until the debtors had paid all of their other creditors and departed with the remaining funds.

In sum, Delta seeks to bar "relitigation" of National Union's claim against Delta, an issue never joined against a party never joined in bankruptcy court. Delta seeks such relief despite the fact that Delta knew of National Union's claim when Delta deposited over $1 million in the registry of the bankruptcy court, without informing either the bankruptcy court or National Union of the full scope of proceedings involving Delta and the debtors. The Anti-Injunction Act bars Delta from seeking such inappropriate relief, and Delta's petition to this Court should therefore be denied.

(v) Delta suffered no violation of due process.

The Fifth Amendment to the United States Constitution provides that:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War

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requested injunction, as in *Olin, supra*. Because an injunction is barred by the Anti-Injunction Act, National Union does not fully brief whether a bankruptcy court could issue an injunction pursuant to the All Writs Act. However, 28 U.S.C. §§ 1334 and 157 and the Order of Reference of the U.S. District Court for the Eastern District of Louisiana (discussed above) do not appear to have referred any authority to the bankruptcy court under the All Writs Act. *See In re Fisher*, 151 B.R. 895, 899 (Bankr. N.D.Ill. 1993) (similar analysis of 28 U.S.C. § 1367).

> or public danger; nor shall any person be subject to the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Delta wrongly claims that it will be deprived of property without due process of law unless this Court restores the permanent injunction granted by the bankruptcy court and overturned by the district court and the Fifth Circuit. In making such a claim, Delta first ignores the fact that it had its day in court and lost in the district court and the U.S. Fifth Circuit Court of Appeals. Second, Delta ignores the fact that it is only trying to enjoin a trial in state court in which due process will presumably be accorded to Delta.

Third, Delta ignores the due process considerations in the only case it cites in support of a specific argument. Delta makes the following query in its Petition to this Court:

> If "Fifth Amendment due process considerations take precedence over the discharge provisions of the Bankruptcy Code" where lack of notice is involved, *In re Eliscu*, 85 B.R. 480, 482 (Bankr. N.D.Ill. 1988), citing *Mullane v. Central Hanover Tr. Co.*, 339 U.S. 306 (1949) [*sic*], should not the same considerations be paramount when a party is threatened in state court with deprivation of property as a direct consequence of its compliance with a federal court order?

Petition at p. 16. In *In re Eliscu*, the court noted that due process trumps the discharge provisions of the Bankruptcy Code "where the debtor has knowledge of claims

and fails to inform claimants of the pendency of the proceedings." *In re Eliscu*, 85 B.R. 480, 482 (Bankr. N.D.Ill. 1988). The court went on to quote this Court's statement in *Mullane* that:

> An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.

Id., quoting *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 70 S.Ct. 652, 94 L.Ed. 865 (1950).

Delta had full notice of the 1988 adversary proceeding. It was National Union who was deprived of notice and due process in the bankruptcy court. The debtors filed a motion to compel deposit of funds on April 4, 1988 (App. 24) and the bankruptcy court granted it the next day (*id.*). Delta then paid over one million dollars into the registry of the bankruptcy court without telling the bankruptcy court about National Union's claim, and now complains noisily about "civil double jeopardy" and purported violations of due process. It was Delta who created that situation when it did not say a word to the bankruptcy court nor to National Union. Delta could have avoided all of its purported problems, and the situation later described by the bankruptcy court as "an injustice" (App. 20).

Delta should have avoided the whole situation, because Delta had an obligation to the court to inform the court about National Union's claim. Local Rule 1.05 of the United States District Court for the Eastern District of Louisiana provides as follows:

> Whenever a civil matter, commenced in or removed to the court, involves subject matter that either comprises all or a material part of the subject matter or operative facts of another action, whether civil or criminal, then pending before this or another court or an administrative agency, or previously dismissed or decided by this court, counsel shall append on a separate sheet of paper, to the front of the complaint, a list and description of all such actions then known to counsel and a brief summary of the relationship. If information concerning any such action or proceeding is obtained subsequent to the filing of the original pleading in the latter case, *it shall be the duty of counsel obtaining such information to notify the court* and opposing counsel in writing of the information so received in the same manner.

(Emphasis added.)

The bankruptcy court found that Delta did not violate Rule 1.05 because it was not Delta who commenced the 1988 adversary proceeding (App. 15). However, the emphasized portion of Rule 1.05 applies by its terms to counsel for parties other than a plaintiff, and creates a continuing duty. Rule 1.05 is simply a procedural vehicle to implement the widely recognized duty of candor to the tribunal. Rule 3.3 of the American Bar Association's Model Rules of Professional Conduct provides, in pertinent part, that "[a] lawyer shall not knowingly: (1) make a false statement of material fact or law to a tribunal; [or] (2) fail to disclose a material fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client. . . . " Comment [2] to that

Rule explains that "[t]here are circumstances where failure to make a disclosure is the equivalent of an affirmative misrepresentation."

As explained by Delta in its Petition, National Union was entitled to reimbursement for workers' compensation payments "off the top" of the amount that Delta was obligated to pay to the debtors. (Petition at pp. 5-6 n.4.) Delta therefore stood to lose absolutely nothing by informing the bankruptcy court of National Union's claim, and Delta's counsel had no reason to avoid such disclosure as it would not interfere with counsel's zealous representation of his client.

In this context, it is implausible for Delta to claim a violation of due process. First, National Union, not Delta, was deprived of notice. Second, any injury suffered by Delta could have been avoided by Delta informing the bankruptcy court or National Union of the full scope of proceedings involving the debtors' claim to the funds deposited by Delta. Third, Delta seeks to perpetuate an injustice to National Union which was, at least in part, caused by Delta's own failure to disclose National Union's claim to the bankruptcy court seven years ago. For these reasons, Delta's petition should be denied.

CONCLUSION

For the reasons stated above, petitioner, Delta Airlines, Inc. has not shown any error in the decisions of the U.S. Fifth Circuit Court of Appeals and the United States District Court for the Eastern District of Louisiana, which properly reversed a decision of the United States Bankruptcy Court for the Eastern District of Louisiana. Neither has Delta shown any other basis for this Court to grant Delta's petition for writ of certiorari.

Respondent, National Union Fire Insurance Company of Pittsburgh, Pennsylvania, therefore requests that this Court deny Delta's petition for writ of certiorari.

Respectfully submitted,

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No. 94-1683

In The

Supreme Court of the United States

October Term, 1994

DELTA AIRLINES, INC.,

Petitioner,

versus

NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PENNSYLVANIA,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

REPLY BRIEF OF PETITIONER DELTA AIRLINES, INC.

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REPLY BRIEF OF PETITIONER DELTA AIRLINES, INC.

Taking in sequence some of the assertions by Respondent National Union in opposition to Delta's Petition, Delta replies as follows:

1 – National Union says it submits a statement of the case "to address perceived misstatements of fact in the statement of the case submitted by petitioner, Delta Airlines, Inc." (Respondent's Brief, hereinafter referred to as "RB", p. 4)

Delta Replies: What "misstatement"? Where? National Union does not identify any such "misstatement", nor is there any.

2 – National Union says that following the dismissal of Delta's third party complaint in the bankruptcy court on January 15, 1993, "Delta then commenced a new adversary proceeding . . . " (RB, p. 5.)

Delta Replies: True, but it was filed at the express suggestion of the bankruptcy court, which in its dismissal of Delta's third party complaint stated that the dismissal was "without prejudice to be refiled, if warranted, as a declaratory judgment action." (See Delta's Petition for Writ of Certiorari, p. 7.) Would it have made any difference in the continuity of the original adversary proceeding had Delta simply filed its Complaint for Declaratory Judgment in that previous proceeding rather than initiating a new one at the invitation of the bankruptcy court? Delta submits that it would not. Although the bankruptcy court dismissed the third party action, it continued in effect the preliminary junction it had issued, the same injunction later made permanent in the Complaint for Declaratory Judgment.

3 – National Union argues that it was not a party to the adversary proceeding when the bankruptcy court commanded Delta to deposit the judgment in the registry of the bankruptcy court, and therefore the bankruptcy court lacks jurisdiction to enjoin National Union, a non-party to the original adversary proceeding. (RB, pp. 7, 13, 21, 25.)

Delta Replies: Neither the district court nor the Court of Appeals apparently considered this

argument in their decisions. The district court simply held that because the bankruptcy petition had been dismissed, the bankruptcy court lacked jurisdiction to issue a subsequent injunction, and the Court of Appeals affirmed the district court on that ground. Delta pointed this out on page 9 of its Petition, footnote 5:

> "Since the appellate and district courts relied solely on the district court's 'reasons relating to subject matter jurisdiction' in denying Delta relief, Delta does not now discuss in this petition any of National Union's other arguments against the injunction, for example, those relating to the 'relitigation exception' to the Injunction Act, 28 U.S.C. 2283, and lack of 'notice' of the bankruptcy court's deposit order, all of which arguments were previously briefed but apparently were not considered by either the appellate or district courts essential to, or dispositive of, the issue of the validity of the bankruptcy court's injunction decree."

4 – National Union claims that Delta, in effect, "settled" its obligation to the Schwambs, without first notifying National Union, as a tortfeasor would be required to do under Louisiana law if it were going to *compromise* the victim's claim. (RB pp. 20, 22; R.S. 23:1102; Delta's Petition for Writ, App. 30, 33.)

Delta Replies: This agument was urged vigorously by National Union in the lower courts, and was rejected. The bankruptcy court said:

> "After carefully considering this matter, this Court finds that Delta had no obligation to notify National Union of the proceedings in

> this Court. The cases cited by National Union concerning this issue [citing] are inapposite to the case at bar. These cases stand for the proposition that the 'settling tortfeasor' may be liable to a worker's compensation intervenor if the settlement is made without notice to the intervenor. As Delta had pointed out, Delta did not settle, or compromise any claim. Pursuant to this Court's order, Delta satisfied a judgment by paying the amount of money due into the registry of this Court."
>
> – Delta's Petition for Writ, App. 14, 15.

See also R.S. 23:1102, attached as App. 33 to Delta's Petition for Writ, in which the word "compromise" is used 14 times. National Union's charge that Delta "effected the equivalent of an illicit, out-of-court settlement without notice to National Union", is patently absurd. Why on earth would Delta want to conceal from National Union the fact that Delta was paying off the judgment? National Union offers no explanation for such a baseless accusation, and neither the district court nor the Court of Appeals apparently considered it.

National Union insinuates that the bankruptcy court's comment that an "injustice has been done" because of lack of notice (Petition for Writ, App. 20) was intended as a reproof of Delta. (RB pp. 12, 22, 27.)

Delta Replies: The bankruptcy court's remark was clearly in reference to "Delta's reply memorandum filed this date", in which Delta pointed out that the Schwambs and their counsel had not given notice to National Union of their plans to pay off all interested parties

except National Union, and dismiss the bankruptcy petition. (See Petition for Writ, pp. 18-19, App. 20.)

6 – National Union claims that Delta's problems are the consequence of Delta's failure to comply with a local federal court rule requiring that when a civil matter is commenced, counsel shall append to the complaint a description of all other actions relating to the case, "whether civil or criminal, then pending before this or another court or an administrative agency . . . " (RB pp. 3, 27, 29.)

Delta Replies: Although National Union raised this issue in the bankruptcy court and in the district court, it apparently abandoned it in the Court of Appeals, since it was never mentioned in National Union's brief or argument to that court. In any case, the bankruptcy court rejected the argument. Pretermitting the question of whether or not the reference in the rule to "this or another court or an administrative agency" includes a state court, the bankruptcy court said:

> "Finally, this Court finds that National Union's charge that Delta violated Local Rule 1.05 is without merit. As Delta points out, this rule is directed to a party who files a lawsuit ('counsel shall append on a separate sheet of paper, the front of the complaint . . . '). Delta was brought into the original adversary proceeding in this matter, Adv. No. 88-0099-K, commenced on April 4, 1988, as a defendant. The only participation of Delta in the proceeding was to comply with the Court's order that Delta

> deposit the amount of the state court judgment into the registry of the Court. Therefore, this Court rejects this argument of National Union."
>
> – Delta's Petition for Writ, App. 15.

As a matter of fact, the bankruptcy court *had been informed* that Schwamb owed reimbursement of compensation benefits out of the money deposited in the registry of the bankruptcy court. In his Disclosure Statement to the bankruptcy court, Schwamb included as "Contemplated Future Litigation" the following: "Litigation which would seek reimbursement of worker's compensation payments . . . estimated to be approximately $100,000.00." (Rec. 126, p. 9.) The problem is not that the bankruptcy court was not notified of the obligation of Schwamb to National Union; it is that Schwamb did not notify National Union of the pending distribution of the money and dismissal of the bankruptcy. Throughout its brief, National Union states, suggests or implies that Delta owed to National Union a legal duty to notify National Union of the deposit of the judgment into the registry of the bankruptcy court. (RB pp. 5, 13, 14, 20, 21, 22, 23, 25, 27, 28, 29.) No authority is cited for this assertion. It was not considered by either the district court or the Court of Appeals and it supplied no basis for the reversal of the bankruptcy court.

NATIONAL UNION'S LEGAL ARGUMENTS AND AUTHORITIES

National Union cites few cases that were not discussed in Delta's petition for writ. Delta submits that it is entitled, under those authorities, to the relief it seeks, and further submits that none of National Union's arguments with respect to those authorities, or to additional ones it has cited, militate against that relief.

In Re: Income Property Builders, Inc., 699 F.2d 963 (9th Cir. 1982) concerns the dismissal of an untimely appeal from the dismissal of a bankruptcy case. *Taylor* and *In Re: Franklin*, 802 F.2d 324 (9th Cir. 1986) are cited in *In Re: Taylor*, 884 F.2d 478 (9th Cir. 1989), cited for comparison in Delta's petition for writ, p. 12. *Benson and Ford, Inc. vs. Wander Petroleum Co.*, 833 F.2d 1172 (5th Cir. 1987) is cited in support of National Union's "relitigation" argument, an issue that was not considered by either the district court or the Court of Appeals. (See above.) Moreover the central issue in *Benson*, that is, whether plaintiff was precluded from pursuing an action because plaintiff was bound by a judgment in an earlier case involving other parties with whom it was alleged plaintiff was in privity, is inapplicable here.

The language of *A. H. Robins Co., Inc. vs. Piccinin*, 788 F.2d 994 (4th Cir. 1986) is actually supportive of the bankruptcy court's authority here to "prevent suits against third-party defendant (read "Delta") . . . when there is such identity between debtor (read "Schwamb") and third-party defendant (read "Delta") that debtor (read "Schwamb") may be said to be the real party defendant and judgment against third-party defendant (read "Delta") will in effect be judgment or finding against

debtor (read "Schwambs'). It is Schwamb who owes the money here to National Union, Delta being only a surrogate party with deep pockets if Schwamb won't pay.

FDIC v. Colonial Realty Co., 966 F.2d 57 (2d Cir. 1992) confirms the equitable powers of the bankruptcy court, but is inapplicable to this case. *In Re: Haug*, 19 B.R. 223 (Bankr. D. Ore. 1982) is likewise inapplicable. It simply held that a complaint to obtain a judgment for damages and a determination of non-dischargeability against the debtor were not civil proceedings arising under Title 11 and therefore could not be prosecuted in the bankruptcy court. The facts of *Haug* are not analagous to this case, nor do its rubrics regarding bankruptcy court jurisdiction argue against Delta's position here.

In Re: Joint E & So. Dist. Asbestos Litigation, 769 F.Supp. 85 (E. & S.D. N.Y. 1991) affirms the general ancillary jurisdiction of a federal court over an impleaded third-party claim. National Union contrasts it with the bankruptcy's court dismissal of Delta's third-party claim (RB p. 16, footnote 18), but Delta submits the case is irrelevant. Delta's Complaint for Declaratory Judgment was substituted for its third-party claim at the suggestion of the bankruptcy court. The common thread, i.e., the injunction issued in the adversary proceeding, continued through the Complaint for Declaratory Judgment.

Santo Padre vs. Pelican Homestead & Savings Association, 937 F.2d 268 (5th Cir. 1991) argues the "relitigation" issue, which, again, was not considered by either the district court or the Court of Appeals which decided only that the bankruptcy court could not issue the injunction because the bankruptcy petition (but not the adversary

proceeding) had been dismissed and there existed, therefore, no "estate" upon which the bankruptcy order could have a "conceivable effect".

Other cases cited by National Union concern the baseless charge that Delta improperly "settled" with the Schwambs, or are so tenuously related to the issues here as to constitute distractions. Delta submits that National Union has cited a patchwork of discrete orders, holdings and observations in a variety of circumstances, the totality of which does not supply a coherent, legal rationale to deny to Delta the relief it seeks.

It cannot be that a party should fulfill all its legal obligations to everyone by complying with a federal court order, and then, when threatened with state litigation as a consequence of its obedience to the federal court order, be abandoned by the system, to "twist, slowly, slowly in the wind."

> "They (the equitable powers of a bankruptcy court) have been invoked to the end that fraud will not prevail, that substance will not give way to form, that technical considerations will not prevent substantial justice from being done."
>
> – *Pepper v. Litton*, 308 U.S. 295, 304-305 (1939)

That is all the bankruptcy court did when it issued the injunction in this case.

Respectfully submitted,

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